Neutral Citation: 1997 ONICDRG 224

OIC A96-000666

ONTARIO INSURANCE COMMISSION

BETWEEN:

CYRIL MORGAN

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON PRELIMINARY ISSUE

Issues:

The Applicant, Cyril Morgan, was injured in a motor vehicle accident on July 11, 1992. He applied for and received statutory accident benefits from Allstate Insurance Company of Canada ("Allstate"), payable under Ontario Regulation 672.[1] Allstate terminated weekly income benefits on January 22, 1993. The parties were unable to resolve their disputes through mediation and Mr. Morgan applied for arbitration under the *Insurance Act,* R.S.O. 1990, c.I.8, as amended.

The preliminary issue in this hearing is:

1. Is Mr. Morgan precluded from proceeding to arbitration pursuant to section 281(5) of the *Insurance Act?*

Mr. Morgan also claims his expenses incurred in the hearing of this preliminary issue.

[1] Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule.* After that date it became the *Statutory Accident Benefits Schedule —Accidents On or Between June 22, 1990 and December 31, 1993.* In this decision, the term *"Schedule"* will be used to refer to Regulation 672.

Result:

1. Mr. Morgan is precluded from proceeding to arbitration pursuant to section 281(5) of the *Insurance Act.*
2. Mr. Morgan is entitled to his expenses pursuant to section 282(11) of the *Insurance Act.*

Hearing:

The hearing of the preliminary issue was held at the offices of the Ontario Insurance Commission in North York, Ontario, on April 29, 1997. The matter proceeded by way of an agreed statement of facts, joint exhibits and submissions.

Present at the Hearing:

Applicant:	Cyril Morgan
Mr. Morgan's Representatives:	Temistocle Tucci Barrister and Solicitor Assisted by Joseph Caprara
Allstate's Representative:	Gerald S. George Barrister and Solicitor
Before:	William J. Renahan Arbitrator

Background:

Mr. Morgan was involved in a motor vehicle accident on July 11, 1992. Allstate paid him $185 per week pursuant to section 13 of the *Schedule.* By letter dated January 20, 1993 Allstate terminated weekly benefits effective January 22, 1993. Mr. Morgan conceded that the written notice Allstate sent to him was a clear and unequivocal refusal to pay weekly benefits beyond January 22, 1993 within the meaning of section 24 of the

Schedule. Mr. Morgan signed his Application for Arbitration on February 28, 1996 and the Commission received the Application on March 1, 1996.[2]

Allstate seeks to have the Application dismissed on the grounds that it is proscribed by section 281(5) of the *Insurance Act,* in that it was commenced more than two years after Allstate refused to pay further weekly benefits. Mr. Morgan argued that he is entitled to claim weekly benefits beginning with those which became due during the two-year period preceding the date he commenced his Application for Arbitration.

Issue:

The issue involves the interpretation of the limitation period set out in section 281(5) of the *Insurance Act.* The limitation period for claiming accident benefits was enacted on June 22, 1990. It provides as follows:

> 281(5) A proceeding in a court or an arbitration proceeding in respect of statutory accident benefits must be commenced within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the *Statutory Accident Benefits Schedule.*

Before the 1990 enactment, the limitation period for claiming accident benefits was contained in Schedules to the *Insurance Act.* A number of court decisions considered that limitation period. The pre-1990 limitation period provided as follows:

> Every action or proceeding against the Insurer for the recovery of a claim under this section shall be commenced within one year from the date on which the cause of action arose and not afterwards.[3]

The authors of *Insurance Law in Canada* [4] summarized the manner in which courts interpreted the pre-1990 limitation period as follows:

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[2] Mr. Morgan commenced another Application for Arbitration dated June 6, 1995 in which he incorrectly named Progressive Casualty Insurance Company as the Insurer. He conceded that this Application was commenced more than two years after January 22, 1993. Allstate indicated that it was not aware of that Application until the commencement of this hearing. This hearing proceeded on the basis that the Application for Arbitration dated February 28, 1996, which named Allstate as the insurer, was the Application under consideration.

[3] *Insurance Act,* R.S.O. 1970, c. 224, Schedule E and *Insurance Act,* R.S.O. 1980, c. 218, Schedule C.

> Causes of action for the recovery of ongoing payments, such as income replacement benefits under no-fault auto insurance or accident and sickness insurance, continually renew themselves each time an instalment becomes payable because the insurer is under a continuing liability for each succeeding benefit. Therefore so long as entitlement to the benefits continues (by continued disability), the limitation period only bars claims "originating more than [the prescribed period] before the commencement of an action." Each cause of action "originates" with each benefit as it becomes payable, allowing for any time period between entitlement and the insurer's deadline to pay. [footnotes omitted]

I applied these authorities in *Kirkham and State Farm Mutual Automobile Insurance Company.,* August 15, 1996, A96-000141 and held that the limitation period provided for by section 281(5) did not bar claims for weekly income benefits payable for pay periods which ended in the two-year period prior to the commencement of the Application for Arbitration. The Director's Delegate rejected my reasoning in *State Farm Mutual Automobile Insurance Company and Kirkham,* January 27, 1997, O.I.C. File No. P96-00069 and held that Mr. Kirkham's claim for weekly benefits was proscribed by section 281(5) because he commenced his Application for Arbitration more than two years after he had received State Farm's refusal to pay further weekly benefits.

Although I am bound by the decision of the Director's Delegate, the insured raised two arguments which the Director's Delegate did not directly deal with. The arguments have merit and in view of the significance of the interpretation of section 281(5), I feel it is worthwhile to summarize those two arguments.

1. Reason for change in words

The Court of Appeal recently interpreted the pre-1990 limitation period in *Wilson's Truck Lines Limited v. Pilot Insurance Company,* 31 O.R. (3d) 127. Mr. Tucci argued, on behalf of the insured, that the Court's analysis of the pre-1990 limitation period shows how the current limitation period is different. He argued that the difference between the

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[4] Brown, C., and Menezes J. *Insurance Law in Canada* (A treatise on the principles of indemnity insurance as applied in the common law provinces of Canada) 2d ed. Scarborough: Thompson Professional Publishing Canada, 1991 at p. 246.

two limitation periods is only the event which starts the limitation period running and not the very nature of the limitation period.

In *Wilson's Truck Lines* the insured, Bourne, was involved in a motor vehicle accident in February 1982. He submitted a claim for accident benefits on March 15, 1982. The trial judge found that for the next four years Pilot considered whether it would pay weekly benefits. He wrote:

> . . . [Pilot] did not unequivocally refuse to pay Bourne's claim. Under the pretext of requiring additional medical and financial information, it led Bourne and his solicitor down the proverbial garden path, hoping thereby to delay or to defeat Bourne's claim.

The trial judge ruled that the limitation period did not begin to run until the insurer gave a "clear and certain refusal" to pay.

One of the issues on appeal was when the limitation period commenced. The Court of Appeal wrote:

> We do not read any of these cases as authority for the proposition that an insured has no claim for accident benefits until there is a positive act of refusal by the insurer. To put it another way, the insurer need not specifically refuse to pay before the limitation period will commence. A refusal to pay, or a denial of liability is not a condition precedent, although both will be relevant to the question when, if ever, did the cause of action arise. The definition by Morden J.A. in *July* of "cause of action" as being "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person", applied to this case, means that Bourne could have obtained a remedy against Pilot 31 days [5] after filing his claim.

Mr. Tucci argued that the limitation period was amended in 1990 for two remedial purposes. The first was to increase the limitation period from one to two years, so that an insured who was refused benefits could claim weekly benefits which became due in the two-year period before he commenced a proceeding for the recovery of those benefits.

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[5] Under the policy the insurer was required to pay benefits within 30 days after it received proof of loss and thereafter, within each 30-day period while it remained liable for payments.

The second remedial purpose was to remove the words "cause of action" from the limitation period and to clarify and restrict what an insurer must do if it wishes to rely on a limitation period. As illustrated by *Wilson's Truck Lines,* a failure by the insurer to pay a weekly benefit, might start the pre-1990 limitation period running. Section 281(5) now specifies that the limitation period does not start to run until the insurer refuses to pay the benefit claimed. Now, the only facts which are relevant to determine whether the limitation period has commenced is whether there exists an entitlement to the benefit claimed **and** a refusal by the insurer to pay it.

Mr. Tucci argued that the Courts have consistently held that causes of action for the recovery of income replacement benefits continually renew themselves each time an instalment becomes payable and that the limitation period only bars claims which originated more than the prescribed period before the commencement of the proceeding. He argued that section 281(5) only restricts the events which start the limitation period running by eliminating failure to pay as a way in which an insurer may breach the contract and start the limitation period running. The 1990 amendments to the *Insurance Act* do not change the "rolling" nature of the limitation period.

2. Rules of interpretation

Mr. Tucci argued that even if the limitation period is capable of two interpretations, the interpretation more favourable to the insured should govern. He relied on *July v. Neal,* 57 O.R. (2d) 129 where MacKinnon A.C.J.O. considered a limitation period under unidentified motorist coverage. He wrote:

> Insurance policies are statutory contracts and the wording of the terms as in the instant case normally are not the words of the insurer but the words of the statute or the regulation. To such terms the *contra proferentem* rule does not apply. However, the insurance industry is consulted and does have input with regard to legislation affecting the industry. The individual insured has none. His role is to pay the premium for the expected indemnity. It appears to me that if there is doubt in the legislation establishing and governing the cover, and there are two possible interpretations of any aspect of the cover, the one more favourable to the insured should govern.

Conclusion:

Although I find that Mr. Tucci's submissions have merit, I agree with Mr. George's submission on behalf of State Farm that I am bound by the Director Delegate's decision in *Kirkham.* Accordingly, Mr. Morgan's Application for Arbitration dated February 28, 1996 and received by the Commission on March 1, 1996 is dismissed because it was not commenced within two years of January 22, 1993.

Expenses:

Mr. Morgan's arguments were worthwhile and thought-provoking. He is entitled to his expenses pursuant to section 282(11) of the *Insurance Act.*

Order:

1. The Applicant's Application for Arbitration dated February 28, 1996 is dismissed.
2. The Applicant is entitled to his expenses pursuant to section 282(11) of the *Insurance Act.*

William J. Renahan
Arbitrator

Date