**Financial Services Commission of Ontario**

**Commission des services financiers de l'Ontario**

Ontario



**Neutral Citation: 2017 ONFSCDRS 138**

**FSCO A15-003691**

**BETWEEN:**

**MOHAMMED NIYAS**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

# DECISION ON A PRELIMINARY ISSUE

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| **Before:** | Arbitrator Alan G. Smith |
| **Heard:** | In person at ADR Chambers on June 2, 2016 and by written submissions completed on March 9, 2017 |
| **Appearances:** | Mr. Adam Ridolfi for Mr. Mohammed Niyas<br>Mr. Ryan Kirshenblatt for State Farm Mutual Automobile Insurance Company |

**Issues:**

The Applicant, Mr. Mohammed Niyas, was injured in a motor vehicle accident on November 18, 2009, and sought accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through Mediation, and Mr. Niyas, through his representative, applied for Arbitration at the Financial Services Commission of Ontario ("FSCO") under the *Insurance*

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

*Act*, R.S.O. 1990, c. I.8, as amended.

The Insurer has applied for an Order that the Applicant's claim for Non-Earner Benefits ("NEBs") is statute-barred on the basis that he failed to apply for Arbitration within the timeframe stipulated by section 281.1 of the *Insurance Act* and section 51 of the *Schedule*.

The issues to be determined in this Preliminary Issue Hearing are:

1. Is Mr. Niyas statute-barred from applying for NEBs as per section 51 of the *Schedule*?
2. Is either party liable to pay expenses with respect to the Preliminary Issue Hearing?

## Result:

1. Mr. Niyas is statute-barred from claiming NEBs as per section 51 of the *Schedule*.
2. Expenses shall be payable. If the parties cannot come to an agreement on the matter of expenses, either party may request in writing an appointment before an ADR Chambers Arbitrator to determine expenses, provided the request is made within 30 days from the date of the Decision.

## EVIDENCE AND ANALYSIS:

### Chronology of Events

The facts underlying this preliminary issue are uncontested. The sequence and dates to this preliminary issue are important and are set out below:

- November 18, 2009: The Applicant suffered injuries in a motor vehicle accident.
- December 18, 2009: The Applicant applied for statutory accident benefits by means of an OCF-1 (standard form "Application for Accident Benefits"). The OCF-1 noted that the Applicant was "employed and working" at the time of the accident. It also advised "No" to the question, "Were you the main caregiver to people living with you at the time of the accident". Mr. Niyas had legal representation at the time he submitted the Application.

- February 26, 2010: The Applicant submitted an OCF-3 (standard form "Disability Certificate"), dated November 26, 2009, signed by the Applicant. The Disability Certificate did not indicate that the Applicant was entitled to NEBs. The document also indicates that Caregiver Benefits were not applicable.
- April 22, 2010: The Insurer refused the Applicant's claim for a NEB. The OCF-9 (standard form "Explanation of Benefits") advised the Applicant with regard to his claim for "Non-Earner Benefits: As you were employed on the date of the accident you do not qualify for this benefit." The OCF-9 also advised the Applicant of his right to dispute the refusal and provided information on how to engage in the dispute resolution process.
- October 29, 2010: A psychological report is prepared and subsequently submitted to the Insurer noting the fact that the Applicant did have a child. No action was taken by State Farm.
- January 27, 2011: The Applicant filed a second OCF-3 indicating entitlement to NEBs. No action was taken by State Farm.
- January 28, 2014: More than three and a half years after the Insurer's April 22, 2010 denial, the Applicant applied to FSCO for mediation of the Insurer's refusal to pay NEBs. The Application was later withdrawn.
- November 28, 2014: The Applicant submitted an OCF-10 to State Farm electing NEBs.
- January 15, 2015: The Applicant filed a second Application for Mediation with FSCO. State Farm argued that the Application is statute-barred due to time limitations.
- April 1, 2016: A mediation was held which failed.

**Law**

Subsection 281(1) of the *Insurance Act*[2] limits an Insured's right to proceed to Arbitration: "A mediation proceeding, evaluation…or a court proceeding or arbitration under section 281 shall be commenced within two years after the Insurer's refusal to pay the benefit claimed."

[2] R.S.O. 1990, c. I.8, as amended.

Subsection 281(5) continues: "A step authorized by subsection (1) must be taken within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided by the Statutory Accident Benefits Schedule."

Section 51 of the *Schedule* also provides that proceedings must be commenced within two years after the Insurer's refusal to pay the amount claimed.

The Supreme Court of Canada in *Smith v. Co-operators*[3] sets out the factors required for Insurers to be able to rely on the limitation period. Insurers must provide a valid refusal of benefits; this refusal must state a clear and unequivocal denial; and it must give reasons for the denial, and provide a description of the dispute resolution process.

The reasons for having a specific limitation date, as set out by the Supreme Court of Canada, are certainty, avoiding stale evidence, and to ensure claims are brought in a timely fashion.[4] The *Schedule* is:

> …designed to ensure timely submission and resolution of accident benefits. It is not in keeping with this overall purpose to suggest that a claimant can delay the start of the limitation period – perhaps indefinitely – by not submitting a disability certificate.[5]

As Arbitrator Barrington recently noted in *Raffa and Personal*:[6]

> The case law is clear that for the limitation period to start to run, there must be a clear and unequivocal denial of a benefit by the Insurer which acts as the "triggering event"[7] and an Insured who wants to pursue a claim must initiate an action within two years of that denial.

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[3] 2002 SCC 20, [2002] 2 S.C.R. 129.
[4] *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6.
[5] *Sagan v. Dominion of Canada General Insurance Company*, 2014 ONCA 720.
[6] *Raffa and Personal Insurance Company of Canada*, FSCO A15-000637, February 21, 2017.
[7] *Kirkham v. State Farm Mutual Automobile Insurance Company*, [1998] O.J. No. 6459 (Div. Ct.). Application for leave to Appeal dismissed, cited in *Garmider and Co-operators General Insurance Company*, FSCO A12-006193, October 22, 2013.

> An Insurer wishing to rely on the expiry of a limitation period must have provided a clear and unequivocal denial of the benefit and must not be estopped from relying on the expiry of the limitation period.[8]



## ARGUMENT

### The Applicant

Mr. Niyas argues in his written submissions that:

> The insured submits that when the insurer received the *OCF-1 "Application"* its obligation were at this point under *section 32, and section 36, of the Schedule* that once the insured person notified the insurer of his/her intention to apply for a benefit *" failed'*,[sic] to promptly provide the insured with ***(a)*** *the appropriate application forms;* ***(b)*** a *written explanation of the benefits available;* ***(c)*** *information to assist the person in applying for benefits; and* ***(d)*** *information on any possible elections, or any time limits in applying for* a *benefit.* As such the *"April 22nd 2010 refusal was invalid"* and the time limit did not begin to run.…The time limit began to run after the refusal of the November 28, 2014, submission of the OCF-10 electing a benefit. [Italics in original]

Mr. Niyas submits that State Farm failed to meet its obligation to continually adjust the file when it did not respond to having been provided with information that the Applicant did have a child in autumn of 2010. In the Applicant's view, the Insurer should have alerted him to the fact that he could elect to receive Caregiver Benefits. Similarly, the Applicant argues that the OCF-9 refusal of NEBs was invalidated by the second OCF-3 in January of 2011.

The Applicant also argues that the Insurer was wrong in law for refusing the NEBs because Mr. Niyas was working at the time of the accident.

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[8] *Zeppieri and Royal Insurance Company of Canada*, [1994] O.I.C.D. No. 13, FSCO A-005237, February 17, 1994, O.I.C.D. No. 147, FSCO P-005237, December 22, 1994.

Mr. Niyas also argues that he should not be prejudiced by the erroneous information conveyed in the OCF-1 and OCF-3 because he did not read the documents before he signed them. Most fundamentally, the Applicant argues that the OCF-9 was not a clear and unequivocal refusal of NEBs because you cannot deny benefits that were not claimed.

**The Insurer**

The Insurer argues in its written submissions that:

> (a) It was entitled to deny the Applicant's non-earner benefit claim based on the Applicant's OCF-1 alone because the OCF-1 constituted an application for all weekly benefits, including a non-earner benefit;
> (b) Its determination that the Applicant did not qualify for a non-earner benefit [in the OCF-9 of April 22, 2010] was a clear and unequivocal refusal that was sufficient to trigger the two-year limitation period…

**ANALYSIS**

I agree with State Farm that:

> The *Straus v. Aviva*[9] decision is a complete answer to the Applicant's submission that the Applicant was somehow prejudiced by not having been provided with the application forms, a written explanation of available benefits, information to assist him in applying for benefits or information regarding possible elections. However, the information contained in the OCF-1 was sufficient to allow the Applicant to claim benefits in a timely manner as the OCF-1 is effectively the application for all potential benefits available to him, as held in *Western and Cejvan*.[10]

Indeed, as the Court held in *Straus v. Aviva*:

[9] 2015 ONSC 4589 (CanLII).
[10] *Western Assurance Company and Cejvan*, FSCO Appeal P14-00007, December 4, 2014.

> The Application form contained very simple language that permitted the insured to check boxes that described their status at the time of the accident and to provide more information where appropriate. This form provided the plaintiffs with sufficient information to allow them to claim the benefits and permitted a timely application for benefits. The insured person did not need to elect which kind of benefit to apply for, and were effectively applying for all benefits that were potentially available to them. Although it would have been preferable for the insurance company to provide a written explanation of benefits when sending the Application Package to each insured, the application process was not hindered in any way by Aviva's failure to do so.[11]

I therefore reject the Applicant's argument that an OCF-9 cannot validly deny a benefit not specifically claimed. I further find that the Applicant was not prejudiced by not having been provided with application forms, a written explanation of available benefits or information to assist him in applying for benefits or information regarding possible elections. In my view, the standard OCF-9 (for the time) used by State Farm complies completely with the criteria mandated by *Smith v. Co-operators*.[12]

The fact being, at the time the OCF-9s were being issued, the insurance industry's position was that an Applicant who was employed at the time of an accident did not qualify for NEBs. This was later found to be incorrect and in my view, is irrelevant in the present case. It was not the responsibility of State Farm to "second-guess" the existing understanding of the law by informing the Applicant that there was a potential election to be made between NEBs and another benefit. If the Applicant chooses to dispute the Insurer's interpretation of the *Schedule*, the onus is on him to dispute it through the legal processes available to him within the time limit set out in the legislation.

There may well be some duty on the Insurer to "continually adjust in good faith" an Applicant's file. However, I find that the onus is on the Applicant to provide clear, cogent information to an

[11] *Supra*, footnote 8, at para. 78.
[12] *Supra*, footnote 3.

Insurer to initiate re-adjustment of the claims. In the present case, the Applicant indicated on the OCF-3 that Caregiver Benefits were inapplicable. The subsequent psychological report did mention that the Applicant had a daughter, but did not indicate that Mr. Niyas was the primary caregiver at the time of the accident.

The Applicant's argument that the filing of the second OCF-3 in January 2011, electing NEBs, reset the running of the two-year time limit also must fail based on the Court of Appeal's Decision in *Sagan v. Dominion*.[13] According to the *Western and Cejvan*[14] Decision, State Farm was entitled to rely on its previous refusal despite new information in the Disability Certificate. Parenthetically, even if the second OCF-3 did "re-start the clock", the Application for Mediation filed in January 2014 would still have been statute-barred.

Finally, given the fact that Mr. Niyas apparently had legal representation at the time of the filing of the OCF-1 and original 2010 OCF-3, I can give little consequence to his assertion that he did not read the documents before signing them.

Both parties made written submissions with regard to the recent FSCO Appeal Decision *Kanagalingam and Economical*.[15] I thank the parties for their thoughts on the Decision. However, as the Applicant notes in his submissions, "The facts in the *Kanagalingam and Economical* Decision is strikingly different from the present case…" The Insurer would appear to agree, as stated in its submissions regarding the fact that the *Kanagalingam and Economical* Decision dealt with the re-election of benefits:

> …Mr. Niyas' case does not concern re-election. The issue set out in the pre-arbitration hearing letter for the preliminary issue hearing was solely whether Mr. Niyas' non-earner benefit claim is statute-barred. That is the only benefit in dispute. Election or re-election of another benefit is not part of these proceedings. Kanagalingham [sic] is distinguishable on this basis.

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[13] *Supra*, footnote 5.

[14] *Supra*, footnote 10.

[15] *Kanagalingam and Economical Mutual Insurance Company*, FSCO Appeal P16-00049, November 30, 2016.

## CONCULUSION

Since I find that the Applicant received a valid denial of the NEBs, the legislation, as noted above, is clear and unequivocal as to the time limits in which to file a dispute. The Applicant has failed to provide any "reasonable explanation", pursuant to the Appeal Decision in *Certas and Grewal*[16] for the delay in filing the Application. The Court of Appeal has made it clear that if the Insurer provides a valid refusal, as with the present case, the limitation period[17] should be strictly adhered to.[18]

## EXPENSES:

Expenses shall be payable. If the parties cannot come to an agreement on the matter of expenses, either party may request in writing an appointment before an ADR Chambers Arbitrator to determine expenses, provided the request is made within 30 days from the date the Decision was issued. Pursuant to the Arbitration Order accompanying this Decision, ADR Chambers remains seized regarding the quantum of the expenses payable.

May 17, 2017

Alan G. Smith
Arbitrator

Date

**Financial Services Commission of Ontario**

**Commission des services financiers de l'Ontario**

**Neutral Citation: 2017 ONFSCDRS 138**

**FSCO A15-003691**

[16] *Certas Direct Insurance Company and Grewal*, FSCO Appeal P09-00001, July 10, 2009.

[17] The two-year limitation period pursuant to s. 281 of the *Insurance Act*, *supra*, footnote 2.

[18] See *Turner v. State Farm Mutual Automobile Insurance Company*, (2005) 195 O.A.C. 61; *Sietzema v. Economical Mutual Insurance Company*, 2014 ONCA 111, 118 O.R. (3d) 713, applied in *Hodgins and Co-operators General Insurance Company*, FSCO A16-004914, March 13, 2017.

**BETWEEN:**

**MOHAMMED NIYAS**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE 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. Mr. Niyas is statute-barred from claiming Non-Earner Benefits as per section 51 of the *Schedule*.
2. Expenses shall be payable. If the parties cannot come to an agreement on the matter of expenses, either party may request in writing an appointment before an ADR Chambers Arbitrator to determine expenses, provided the request is made within 30 days from the date of the Decision.

May 17, 2017

Alan G. Smith
Arbitrator

Date