



FSCO A13-013090

BETWEEN:

MICHAEL DORAN

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Charles Matheson

Heard: In person at Kitchener, Ontario on March 14 and 15, 2016 and by written submissions due March 31, 2016

Appearances: Mr. Robert Deutschmann, lawyer, participated for Mr. Michael Doran
Ms. Anju Sharma, lawyer, participated for RBC General Insurance Company

Issues:

The Applicant, Mr. Michael Doran, was injured in a motor vehicle accident on April 12, 2011. He applied for and received statutory accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Doran applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

¹ *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issue in this Preliminary Issue Hearing is:

1. Is Mr. Doran excluded from receiving non-earner benefits, housekeeping and home maintenance benefits and visitor expenses by virtue of section 31(1)(a) of the *Schedule*?

Result:

1. Mr. Doran is not excluded from receiving non-earner benefits, housekeeping and home maintenance benefits and visitor expenses by virtue of section 31(1)(a) of the *Schedule*.

EVIDENCE AND ANALYSIS:

Legislation and Case Law considered

Smith v. Co-operators General Insurance Company, [2002] 2 S.C.R. 129, 2002 SCC 30 (CanLii)

Walker and Aviva Canada Inc. (FSCO A09-001079, February 28, 2011)

Statutory Accident Benefits Schedule - Effective September 1, 2010, Ontario Regulation 34/10, section 31;

Statutory Conditions-Automobile Insurance, O. Reg. 777/93, sections 3 and 11.

Background

As a result of the April 12, 2011 accident, Mr. Doran suffered extensive injuries including a catastrophic brain injury. This injury has affected his long term and short term memory, among other things.

Mr. Doran had his first car insurance policy under his mother's policy which was effective October 29, 2009 ("First Policy"). RBC cancelled the first policy effective November 4, 2010. During this time frame, Mr. Doran was a student at Wilfrid Laurier University.

On January 17, 2011, Mr. Doran's mother contacted RBC to arrange for another car insurance policy for Mr. Doran that was not attached to her own insurance policy, this policy ("Second Policy") took effect January 18, 2011.

Decision

The parties agree that the onus of proof of this preliminary issue rests with the Insurer.

There was disputed and undisputed evidence presented during this Preliminary Issue Hearing. The undisputed evidence shows the following:

- There was a long series of single missed payments for this First Policy;
- The first of two missed payments of the First Policy was due to insufficient funds;
- The final and second missed payment of the First Policy was due to a stop payment;
- The Insurer cancelled the First Policy because the Applicant had missed two consecutive monthly payments, as per RBC's policies;
- Upon initializing the Second Policy, the Insurer showed no evidence that they corrected the contact information for the Applicant;
- The Applicant requested a new withdrawal date for the Second Policy, from the 3rd of each month, as with the First Policy, to the 22nd of each month for the Second Policy;
- The only evidence presented by the parties on this event was the log notes of RBC, which captured the date change only;
- The Insurer presented evidence that RBC has an internal policy that it takes 90 days to switch a withdrawal date on an active policy;
- The Insurer did not present evidence that this internal policy was communicated to the Applicant;

- The Insurer presented evidence that RBC under another internal policy deducts the first monthly payment 4 business days after initiating a new policy, in this case the Second Policy;
- The Insurer attempted to withdraw the first payment of the Second Policy on January 22, 2011;
- The first withdrawal attempt was returned to RBC due to insufficient funds and a further \$42.50 was added to the Applicant's first monthly bill;
- The Insurer presented evidence that it has another internal policy that allows for a second attempt to withdraw funds for the missed payment seven days after the first missed payment;
- The Insurer did not present any evidence that this internal policy was communicated to the Applicant;
- The second attempt to withdraw funds from the Applicant's bank account was on February 3, 2011, which was also returned to the Insurer due to a stop payment;
- The Insurer generated and sent a cancellation notice letter, dated February 15, 2011, to the Applicant via registered mail to the wrong address;
- The cancellation letter terminated the policy by March 17, 2011, should payment not be made prior to said date;
- The Insurer sent a second non-registered letter to the same address on February 21, 2011, which was also returned to the Insurer on March 7, 2011.

The contested evidence is as follows:

- On March 9, 2011, the Applicant and his mother (Mrs. Doran) called via teleconference to RBC to find out the status of the insurance policy, as they thought the withdrawals were scheduled for the 22nd of each month;
- Mrs. Doran proceeded to negotiate a repayment schedule to satisfy the Insurer and keep the policy valid and on-going;
- Mrs. Doran testified that she was waiting for the Insurer's response to her proposal, and simply called the Insurer back by coincidence the day prior to the cancellation of the Second Policy, as she had not received any correspondence for same;

- On March 16, 2011, Mrs. Doran testified that she called RBC to see if her proposed payment schedule, made by phone on March 9, 2011, had been accepted by the Insurer;
- Mrs. Doran testified that if her proposed payment wasn't accepted by the Insurer, she wanted to know what would constitute an acceptable repayment schedule. Mrs. Doran suggests that the figure of a single payment of \$501.00 was discussed then \$460.95 would be acceptable to the Insurer. Mrs. Doran suggests she was still under the impression that the policy was still valid, as she had not received a single notice otherwise from the Insurer;
- The Insurer, on the other hand, submits that Mrs. Doran was informed that the policy had been cancelled during the above phone conversation and as per the Billing Status Confirmation letter, sent on or about March 15, 2011, which showed the Applicant owed \$460.95 for the time frame of January 18, 2011 to March 17, 2011. The Second Policy outstanding account amount would have to be reconciled before the Applicant could be considered for a third insurance policy;
- The Applicant submits the Billing Status Confirmation letter was sent by regular mail and to the wrong address for the Applicant, as neither he nor his mother received it.

The position of the Insurer, in part, is that the Second Policy was properly cancelled as this termination was in full compliance with the statutory conditions and regulations.

The Insurer argues that section 3 of Regulation 777/93 permits Insurers to terminate a policy of insurance "*inter alia*" non-payment of the whole or part of the premium due under the contract pursuant to section 11 of the Regulation.

Further, the Insurer submits that its internal policies are irrelevant, as long as they do not violate the regulations. The Insurer argues that it cannot be bound by its internal policies, which are admittedly not explicitly defined anywhere nor announced to its clients as part of the contractual terms or objective. The Insurer's internal policies do not have the effect of the law and do not form part of the insurance contract. These internal policies may be changed from time to time as long as they do not violate the law.

The Applicant's position is the cancellation notice was defective for a number of reasons, and therefore void "*ab initio*" and of no force or effect on the date of the car accident.

The Applicant argues that the cancellation letter, dated February 12, 2011, was defective for the following reasons:

- 1) The cancellation letter failed to provide 3 payment options, as the letter specifically excluded the cash payment option of a specified amount, which violates Regulation 777/93 section 11(1.3);
- 2) The cancellation letter failed to provide that the payment could be delivered to a specified RBC insurance location, in cash, but only provided for payment to be mailed to a post office box;
- 3) RBC failed to provide sufficient evidence to show when the registered cancellation letter was mailed and that a 30 day notice period was provided;
- 4) This cancellation letter did not provide instructions in a straightforward and clear language directed to an unsophisticated person.

The Applicant also argued that RBC incorrectly attempted to withdraw a premium payment on February 3, 2011, after the deduction date for the Second Policy was changed to the 22nd day of the month.

Further, RBC failed to give any evidence that the Applicant or Mrs. Doran knew about the internal policies that triggered multiple withdrawal attempts prior to the first payment date of 22 February 2011, thus resulting in the cancellation of the policy and the defective cancellation letter dated February 12, 2011.

The Applicant argues that in the alternative, the Applicant was under the impression that the second payment should have been on March 22, 2011. If that payment had been missed, then the resulting cancellation would have been well after the subject car accident.

Finally, the Applicant argues that RBC failed to meet its onus of presenting evidence that showed that the Applicant knew or ought to have known that he was operating his car while it was not insured.

Regulation 34/10, section 31 reads, in part, as follows:

Circumstances in which certain benefits not payable

31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,
- (a) in respect of a person who was the driver of an automobile at the time of the accident,
 - (i) if the driver knew or ought reasonably to have known that he or she was operating the automobile while it was not insured under a motor vehicle liability policy,
 - (ii) if the driver was driving the automobile without a valid driver's licence,
 - (iii) if the driver is an excluded driver under the contract of automobile insurance, or
 - (iv) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent;

Regulation 777/93, relied upon by the parties reads, in part, as follows:

Monthly payments

3. Unless otherwise provided by the regulations under the *Insurance Act*, the insured may pay the premium, without penalty, in equal monthly payments totaling the amount of the premium. The insurer may charge interest not exceeding the rate set out in the regulations.

Termination

11. (1) Subject to section 12 of the *Compulsory Automobile Insurance Act* and sections 237 and 238 of the *Insurance Act*, the insurer may, by registered mail or personal delivery, give to the insured a notice of termination of the contract.
- (1.1) If the insurer gives a notice of termination under subcondition (1) for a reason other than non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract or if the insurer gives a notice of termination in accordance with subcondition (1.7), the notice of termination shall terminate the contract no earlier than,
- (a) the 15th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or
 - (b) the fifth day after the insurer gives the notice, if the insurer gives the notice by personal delivery.
- (1.2) Subject to subcondition (1.7), if the insurer gives a notice of termination under subcondition (1) for the reason of non-payment of the whole or any part of the premium due under the contract or of any charge under any agreement ancillary to the contract, the notice of termination shall comply with subcondition (1.3) and shall specify a day for the termination of the contract that is no earlier than,
- (a) the 30th day after the insurer gives the notice, if the insurer gives the notice by registered mail; or
 - (b) the 10th day after the insurer gives the notice, if the insurer gives the notice by personal delivery.
- (1.3) A notice of termination mentioned in subcondition (1.2) shall,
- (a) state the amount due under the contract as at the date of the notice; and
 - (b) state that the contract will terminate at 12:01 a.m. of the day specified for termination unless the full amount mentioned in clause (a), together with an administration fee not exceeding the amount approved under Part XV of the Act, payable in cash or by money order or certified cheque payable to the order of the insurer or as the notice otherwise directs, is delivered to the address in Ontario that the notice specifies, not later than 12:00 noon on the business day before the day specified for termination.

(1.4) For the purposes of clause (a) of subcondition (1.3), if the insured and the insurer have previously agreed, in accordance with the regulations, that the insured is permitted to pay the premium under the contract in instalments, the amount due under the contract as at the date of the notice shall not exceed the amount of the instalments due but unpaid as at the date of the notice.

(1.5) If the full amount payable under clause (b) of subcondition (1.3) is not paid by the time and in the manner that the notice specifies, the contract shall be deemed to be terminated, without any further action being required on the part of the insurer, as of 12:01 a.m. of the day specified for termination.

The cancellation letter, dated February 12, 2011, that was evidenced as the only notice sent via registered mail reads, in part, as follows:

To ensure the continuation of your insurance coverage, we must receive the total missed payment(s) of \$501.23 no later than 12:00 noon on the business day before the specified termination date. Payment can be made by money order or certified cheque payable to RBC Insurance and mailed to:

RBC Insurance Company of Canada
P.O. Box 5010 Station "A"
Mississauga ON L5A 4L2

Automobile insurance is mandatory. We strongly encourage you to make immediate payment of the missed amount, or make other arrangements to ensure that you have valid automobile insurance coverage from the date that your coverage ceases.

The Applicant's argument that the letter is defective is correct in that the letter does not allow for the cash payment of the debt, as stipulated in Regulation 777/93, section 11(1.3). This is a fatal error on the part of the Insurer, in light of the finding of the Supreme Court of Canada in *Smith v. Cooperators General Insurance Company*, where the court found that this particular legislation is consumer protectionist in nature.

When reviewing the evidence of the First Policy, the Applicant was financially irresponsible. However, the experience he received during his First Policy did demonstrate that he knew that two missed payments resulted in a cancellation of his policy and could only serve to form the opinion of this Insured or unsophisticated person. It was very unclear as to why the Insurer treated the Second Policy the same as an on-going policy and did not explain to the Applicant or his mother that the payments were going to be forthcoming in rapid succession, and not withdrawn on the 22nd of each month. It was also unclear by the evidence that the Insurer explained that January 22, 2011 was the first date a payment was required not February 22, 2011, with a two week adjustment to the premium payment for that month.

Surprisingly, there was no evidence that the Insurer attempted to update the Applicant's contact information at the time of renewal of the Second Policy. The Insurer failed to give any evidence that the Applicant knew any of the actions of the Insurer during the timeframe of January 2011 and March 2011.

In my view, it is clear that the Insurer, the sophisticated party, had to give notice of cancellation of the policy or the pending notice of cancellation of the policy in extremely clear language that an unsophisticated party can understand. This, in my view, is the element which is solely in the control of the Insurer.

I find myself in agreement with Arbitrator Lloyd Richards in *Walker and Aviva*.

As in *Walker and Aviva*, in this instant case it was also evidenced that the Insured had no knowledge of a missed payment or two missed payments or any other issues regarding his insurance policy as he was not receiving the letters sent to him, partly because the Insurer did not update his contact information despite speaking to the Applicant and his mother on several occasions with plenty of opportunities to obtain the information. Through the lens of consumer protection, I agree with Arbitrator Richards on page 8 of his decision which reads as follows:

...it was the Scottish York's responsibility to ensure the notice got to Ms. Walker....

While reviewing the defectiveness of the cancellation letter itself, it is clear, in my view, that the regulations require a cash component to the payment scheme alternative for a possible cancellation of an insurance policy. It is because the consequences of a cancellation can be so severe, all components of Regulation 777/93 section 11(1.3)(b) must be adhered to in the strictest terms.

It was evidenced that the termination letter for the First Policy was indeed correct and conformed to all of the Regulations. As evidenced by the Insurer's own witness, the Insurer changed its internal policy in the short few months between cancelling the First Policy and the Second Policy. The Insurer purposely omitted the cash component of the cancellation letter for the Second Policy, contrary to Regulation 777/93 section 11(1.3).

Therefore, for the reasons above, I now find and order the Applicant is not excluded from receiving non-earner benefits, housekeeping and home maintenance benefits and visitor expenses.

EXPENSES:

Neither party made submissions on expenses. Should the parties become unable to resolve this issue, they shall subsequently schedule an Expense Hearing before me in accordance with the provisions of the *Dispute Resolution Practice Code*, once they have settled all other Arbitration disputes between them.

Charles Matheson
Arbitrator

June 6, 2016

Date



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BETWEEN:

MICHAEL DORAN

Applicant

and

RBC GENERAL 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. Doran is not excluded from receiving non-earner benefits, housekeeping and home maintenance benefits and visitor expenses.

Charles Matheson
Arbitrator

June 6, 2016
Date