

1995 CarswellOnt 4927
Ontario Insurance Commission

Talany v. Royal Insurance Co. of Canada

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Jack Talany, Applicant and Royal Insurance Company of Canada, Insurer

Seife Arb.

Heard: February 24, 1995

Judgment: May 3, 1995

Docket: A-009300

Counsel: Mr. Talany, for himself
Mr. Nestor Kostyniuk, for Insurer

Subject: Insurance

Headnote

Insurance

Seife Arb.:

1 The Applicant, Jack Talany, was injured in a motor vehicle accident on November 19, 1991. He applied for and received statutory accident benefits from the Royal Insurance Company ("Royal"), payable under Ontario Regulation 672¹. The parties were unable to resolve their dispute regarding Mr. Talany's weekly income benefits in mediation. Mr. Talany applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 At a pre-hearing discussion in this matter held on December 22, 1994, counsel for Royal took the position that Mr. Talany cannot proceed to arbitration on the merits of his claim because his application for arbitration is time-barred under the *Insurance Act* and the *Schedule*.

3 The hearing on this preliminary issue was held on Friday, February 24, 1995. The Insurer was represented by Mr. Nestor Kostyniuk. Mr. Talany represented himself. Interpretation in the Arabic language was provided by Mr. Azmi Hamouda of ANAT (Associated North American Translators).

4 The following exhibits were filed at the hearing:

Exhibit 1 List of Key Dates prepared by counsel for Royal

Exhibit 2 Notes of telephone conversations of George Szyпка

Exhibit 3 Letter dated February 5, 1992, from George Szyпка to Mr. Talany

Exhibit 4 Cheque stub date stamped as negotiated on February 20, 1992

Exhibit 5 Cheque stub date stamped as negotiated on February 21, 1992

Exhibit 6 Assessment of Claim by Insurer form, dated February 13, 1992

Exhibit 7 Letter from Gluckstein Neinstein to George Szyпка, dated March 4, 1992

Exhibit 8 Letter from George Szyпка to Gluckstein Neinstein, dated March 24, 1992

Exhibit 9 Letter from George Szyпка to Gluckstein Neinstein, dated October 19, 1992

Exhibit 10 Computer printout of Occurrences in Mr. Talany's claim file

Exhibit 11 Assessment of Claim by Insurer form, dated February 11, 1993

Exhibit 12 Cheque stub dated July 6, 1993

5 George Szyпка, insurance adjuster, gave oral testimony on behalf of Royal Insurance. Mr. Talany filed certain documents into evidence. He did not testify.

6 Based on Mr. Szyпка's uncontradicted testimony and the documentary evidence filed by both parties, I find the following facts are not in dispute:

1. Mr. Talany was involved in a motor vehicle accident on November 19, 1991.
2. Mr. Talany was paid weekly income benefits until January 20, 1992.
3. Mr. Talany has not been paid weekly income benefits since January 20, 1992.
4. A letter from Mr. Szyпка to Mr. Talany, dated February 5, 1992, purporting to be Royal's notice of refusal to pay weekly income benefits, was received by Mr. Talany on or about February 21, 1992.
5. Mr. Talany applied for mediation of the dispute on February 24, 1994.
6. The Report of Mediator was issued on May 30, 1994.
7. Mr. Talany applied for arbitration on September 15, 1994.

7 Subsection 281(5) of the *Insurance Act* states that an Applicant must commence his or her arbitration proceeding concerning a dispute about statutory accident benefits within two years of an insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the *Schedule*.

8 Section 26 of the *Schedule*, as amended, states as follows:

26. — (1) A mediation proceeding under section 280 of the Insurance Act or an arbitration or court proceeding under section 281 of the Act in respect of benefits under this Regulation must be commenced within two years from the insurer's refusal to pay the amount claimed in the application for statutory accident benefits or, if the person has attended school or accepted, or returned to, an occupation or employment, as permitted by section 16, within two years of the insurer's refusal to pay further benefits.

(2) Despite subsection (1), an arbitration or court proceeding under section 281 of the Insurance Act may be commenced within 90 days after the mediator reports to the parties under subsection 280(8) of the Act.

9 Subsection 24(8) of the *Schedule* provides that if the insurer refuses to pay an amount claimed in an application for statutory accident benefits, the insurer shall forthwith give written notice to the insured person giving reasons for the refusal.

10 Mr. Kostyniuk argues that Mr. Szyпка's letter of February 5, 1992 to Mr. Talany satisfies all of the requirements of subsection 24(8) of the *Schedule*. He submits that Mr. Talany is barred from proceeding in this arbitration because he has not filed for mediation within two years of receiving this letter.

11 A finding that the notice of refusal to pay benefits satisfies the requirements of subsection 24(8) of the *Schedule* is a prerequisite to any inquiry about the application of time limitations under the *Schedule* or the *Insurance Act*. Therefore, I will address this question first.

12 It has been established in several arbitration decisions that the notice under subsection 24(8) of the *Schedule* must communicate to the applicant the insurer's refusal to pay a benefit and the reasons for the refusal, *in a clear and unequivocal manner*.

13 I have heard evidence from Mr. Szyпка about his telephone conversation with Mr. Talany on January 28, 1992 regarding the termination of his weekly income benefits. Mr. Szyпка testified that the letter of February 5, 1992 was a confirmation of this conversation. In my view, evidence of prior communication, written or oral, between an insured person and the insurer regarding the insurer's refusal to pay benefits, is not a relevant consideration in determining whether the specific document which the insurer relies upon to invoke the statute of limitation satisfies the requirements of subsection 24(8) of the *Schedule*. In my view, the purported notice of refusal itself must state, clearly and unequivocally, and in a simple straightforward fashion, the fact that the insurer refuses to pay the benefit in question, and the reasons for the refusal. The position of the insurer must be ascertained from an objective reading of the notice itself, independent of any prior communication between the parties.

14 Mr. Szyпка's letter of February 5, 1992 to Mr. Talany states as follows, in its entirety:

Dear Sir,

This will further our telephone conversation discussions of January 27 and January 28, 1992 with reference to the above noted matter.

As discussed, the comprehensive medical examination completed by Dr. Hall on January 20, 1992 confirms that you are fit to return to work as of that date. Therefore, Royal Insurance Company has issued one further payment for weekly income benefits from January 14 through to January 20, 1992, one week at \$600.00 for a total of \$600.00. We understand that an Assessment of Claim by Insurer form has or will shortly be directed to you.

We also enclose a payment drawn to your order, as well as to the order of the Downsview Physiotherapy and Community Clinic in the amount of \$585.00. This payment covers physiotherapy treatments through to December 13, 1991. We kindly ask that you endorse the payment and direct it to the physiotherapy clinic to satisfy their account.

The comprehensive medical examination by Dr. Hall has confirmed that the passive physiotherapy which you have been receiving as of that date was serving no useful purpose and therefore would not be an essential treatment which would be covered under the automobile policy. However, should you decide to carry on with the treatments, Royal Insurance will continue to pay for the treatments but will commence mediation proceedings for reimbursement of any treatment expense which is deemed to be unnecessary for your treatment.

Lastly, we enclose an account from Dixie Collision Centre in the amount of \$111.26. The Royal Insurance Company will pay \$80.25 of this account for the appraisal fee. The GST portion of \$23.10 and \$7.91 must be paid by you, as you are entitled to an input tax credit, which will fully reimburse you for this expense through Revenue Canada. Dixie Collision has requested a payment from you in the amount of \$31.01 as soon as possible. We enclose receipts to assist you in recovering this expense from the Government.

With respect to your weekly income benefits claim, should you not agree with the findings of the comprehensive medical examination, Royal Insurance Company does invite you to submit medical evidence to substantiate any ongoing disability which you may allege.

15 Mr. Kostyniuk's position is that this letter clearly and unequivocally states that Royal will not pay Mr. Talany weekly income benefits after January 20, 1992, because medical examination confirms that he is fit to return to work as of that date. I do not agree. I accept that this position can be inferred from the letter. However, based on an objective reading of the contents of the letter alone, and without reference to any prior communication between the parties, I am unable to conclude that Royal communicated its position to Mr. Talany, clearly and unequivocally, in this letter. The letter, written by an insurance adjuster, informs Mr. Talany about the results of the medical examination conducted by Dr. Hall; however, it does not specifically state that Royal has accepted Dr. Hall's findings or that it has decided not to pay weekly income benefits after January 20, 1992.

16 The Assessment of Claim by Insurer form, referred to in the above-quoted letter, is used by insurance companies to advise insured persons when a benefit claim is denied entirely or in part, and the reasons for the denial. The form advises among other things, that if the insured person is not satisfied with the assessment, he/she can call the Ontario Insurance Commission to inquire about his/her right to mediation to resolve the claim. It provides several telephone numbers for the Commission.

17 In this case, it appears that subsequent to the February 5, 1992 letter, two separate Assessment of Claim by Insurer forms were sent by Royal regarding Mr. Talany's weekly income benefits. They are dated February 13, 1992 and February 11, 1993.

18 The Insurer is not required to issue an Assessment of Claim by Insurer form to satisfy the requirements of subsection 24(8) of the *Schedule*, and Royal is not relying on one in this case. However, in my view, by stating in the letter that "an Assessment of Claim by Insurer form has or will shortly be directed to you", Mr. Szyпка has implied that Royal's decision about Mr. Talany's weekly income benefits and its reasons are communicated to Mr. Talany in a separate document.

19 I find that the February 5, 1992 letter does not constitute proper notice of refusal under subsection 24(8) of the *Schedule* and, accordingly, Mr. Talany is not precluded from referring to arbitration the dispute regarding his weekly income benefits. A further pre-hearing will be held to discuss the substantive issues in this case.

Footnotes

- 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 Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.