2010 CarswellOnt 5196
Financial Services Commission of Ontario (Arbitration Decision)

Blier v. Royal & SunAlliance Insurance Co. of Canada

2010 CarswellOnt 5196

Michel Blier, Applicant and Royal & Sunalliance Insurance Company of Canada, Insurer

Jeffrey Rogers Member

Judgment: June 29, 2010
Docket: FSCO A09-002092

Counsel: Mr. David Hollingsworth, for Mr. Blier
Mr. Nestor E. Kostyniuk, for Royal & SunAlliance Insurance Company of Canada

Subject: Insurance

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Insurance

XII Automobile insurance
XII.5 No-fault benefits
XII.5.i Practice and procedure on claim for benefits
XII.5.i.viii Limitation period

Headnote
Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits

Table of Authorities

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8
s. 281 — referred to

s. 281(5) — referred to

s. 282 — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8
Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93

s. 14(1) — referred to

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s. 14(2) — referred to

s. 72(1) — referred to

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

s. 11 — referred to

s. 51 — referred to

s. 51(1) — referred to

s. 56 — referred to

***Jeffrey Rogers Member*:**

The preliminary issue is:

1 1. Is Mr. Blier precluded from proceeding to arbitration because his application for arbitration was filed beyond the 2-year limitation period set out in subsection 281(5) of the *Act* and subsection 51(1) of the *Schedule*?

Result:

2 1. Mr. Blier is precluded from proceeding to arbitration because his application for arbitration was filed beyond the 2-year limitation period set out in subsection 281(5) of the *Act* and subsection 51(1) of the *Schedule*.

Evidence and Analysis:

Facts

3 The relevant facts are not in dispute. They are as follows: Michel Blier was injured in a motor vehicle accident on May 29, 2002. He applied for and received statutory accident benefits from Royal & SunAlliance Insurance Company of Canada ("Royal"), payable under the *Schedule.* [1] After conducting a Functional Abilities Evaluation and receiving an opinion that Mr. Blier could return to work, Royal gave Mr. Blier Notice of Stoppage of Income Replacement Benefits ("IRBs"), effective January 28, 2003.

4 Upon receiving the Notice of Stoppage, Mr. Blier returned to work as a self-employed plumber. He continued to work until 2006. On April 25, 2008 he filed an Application for Mediation seeking ongoing IRBs, with a retroactive start date of July 1, 2006. The dispute was not resolved at mediation and Mr. Blier applied for arbitration. The only benefit claimed in the Application for Arbitration is IRBs. I held a pre-hearing on February 11, 2010 and scheduled this preliminary issue hearing.

The Law

5 Section 281 of the *Insurance Act* and section 51 of the *Schedule* require that an application for mediation be filed within 2 years of the insurer's refusal to pay the benefit claimed. Section 56 of the *Schedule* imposes an obligation on an insured person who is entitled to IRBs to make reasonable efforts to return to the employment in which he or she engaged at the time of the accident. Section 11 of the *Schedule* states that:

> A person receiving an income replacement benefit may return to or start an employment during the 104 weeks following the onset of the disability in respect of which the benefit is paid without affecting his or her entitlement

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to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in the employment.

Analysis

6 Mr. Blier filed his Application for Mediation more than 5 years after Royal gave him Notice of Stoppage. He does not question the validity of the Notice of Stoppage. The 2-year preclusion in sections 281 and 51 therefore applies unless another provision stops or delays its accrual. Mr. Blier argues that he complied with his obligation to make reasonable efforts to return to work and is entitled to "resume receiving benefits" pursuant to section 11 of the *Schedule*. He relies on the Director's decision in *Allstate Insurance Company of Canada and Wright*.[2] Royal argues that, because of changes in the language of the *Schedule* since the decision in *Wright*, the 2-year limitation is not extended by Mr. Blier's return to work.

7 In *Wright*, the applicant was injured in an accident on January 6, 1994. She was paid IRBs until returning to work on a part-time basis in August 1994. She continued working part-time until August 1995. While working part-time, she was paid IRBs at a reduced rate. In August 1995, she returned to full-time work and she continued to work full-time for about 17 months. No IRBs were payable during that period because of the amount she earned. She claimed further IRBs when she again stopped work. The insurer refused to reinstate payment. The Director of Arbitrations upheld the Arbitrator's ruling that Mrs. Wright was entitled to claim further IRBs, by operation of section 14(1) of the applicable *Schedule*[3] which contained an identical provision to the current section 11.

8 The Director reasoned that, because she returned to work within 104 weeks of the onset of her disability, the plain meaning of section 14(1) allowed Mrs. Wright to retain the right to further IRBs even though she continued to work beyond 104 weeks after the onset of disability. The Director concluded that her circumstances did not engage section 14(2) of the applicable *Schedule*. That section limited entitlement to further IRBs, when the return to work occurred after 104 weeks. There is no similar provision in the current *Schedule*.

9 The decision in *Wright* does not address the issue of preclusion of the right to apply for mediation 2 years after being given Notice of Stoppage. The Arbitrator made no reference to stoppage in her decision.[4] In his decision, the Director simply states "[I]f the insurer concludes that the insured person no longer qualifies, it must follow the termination procedures in section 64, as Allstate did here." The Director's decision contains no comment on the operation of the 2-year preclusion. That could not have been an issue in Mrs. Wright's circumstances, because the insurer paid IRBs while Mrs. Wright was working part-time and she claimed reinstatement less than 2 years after she returned to full time work. The earliest that the insurer could have given her Notice of Stoppage was less than 2 years before her claim for reinstatement.

10 While I accept Mr. Blier's submission that section 11 of the *Schedule* has the same meaning as section 14(1) of the predecessor, I do not accept his submission that the decision in *Wright* means that he is entitled to pursue his claim for further IRBs. I reject his submission on 2 grounds. The first is that Mr. Blier's circumstances are different from Mrs. Wright's. The second is that section 51 of the *Schedule* is significantly different from section 72(1) of the *Schedule* that applied to Mrs. Wright's case.

11 The circumstances are as follows: Mrs. Wright was receiving IRBs when she returned to part-time work. She therefore came within the language of the applicable sections because she was "a person receiving income replacement benefits..." when she returned to work. Mr. Blier was not receiving IRBs when he returned to work. Royal had made a determination that he was no longer entitled to IRBs and had given him Notice of Stoppage. That difference took Mr. Blier beyond the language of section 11 and engaged the dispute resolution requirements of sections 281 and 51. Mr. Blier's options were either to accept Royal's determination, or commence mediation within 2 years.

12 Turning to the differences between the relevant *Schedules:* Section 72(1) of the *Schedule* that applied in *Wright* required commencement of mediation within two years from the insurer's refusal to pay the amount claimed "or, if the

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person has engaged in an employment as permitted by section 14...within two years of the insurer's refusal to pay further benefits." That language must be interpreted to mean that a different 2-year period applied when there had been a return to work. Under section 72(1), an insurer might give Notice of Stoppage where a person receiving IRBs returns to work. That Notice would start the 2-year period for disputing entitlement to IRBs for past claims. However, the 2-year period would not commence for further benefits until refusal to pay further benefits, in the event of a further claim.

13 Section 51 does not retain the provision about return to work. The current *Schedule* retains the language of the previous section 14(1) in section 11, but the specific provision regarding return to work has been removed. The removal of this provision, while retaining the language of the previous section 14(1) in section 11, must mean that the 2-year period for all claims commences when the insurer gives Notice of Stoppage, despite the application of section 11. Otherwise, the specific provision in the previous version of section 51 would be superfluous or meaningless. The result is that, even if Mr. Blier's return to work fell within the language of section 11, he would have had to commence mediation within two years of being given Notice of Stoppage.

Conclusion

14 I conclude that the 2-year period for commencing mediation is not suspended in Mr. Blier's circumstances. He is therefore precluded from proceeding to arbitration because his application for mediation was filed beyond the 2-year limitation period set out in subsection 281(5) of the *Act* and subsection 51(1) of the *Schedule.* Since the only benefit claimed is IRBs, the consequence is that the arbitration is dismissed.

Expenses:

15 The parties made no submissions on expenses. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

***Jeffrey Rogers Member*:**

16 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The arbitration is dismissed.

2. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Footnotes

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

2 (FSCO P98-00051, January 18, 1999), Appeal (Upheld upon judicial review, unreported).

3 *The Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93*.

4 (FSCO A97-001633, August 31, 1998)

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