



FSCO A09-000428

BETWEEN:

JACQUELINE WARVILL

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Denise Ashby

Heard: October 21, 2010, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Mark Sarges for Ms. Warvill
Joy E. Stothers for Personal Insurance Company of Canada

Issues:

The Applicant, Jacqueline Warvill, was involved in a motor vehicle accident on March 9, 2006. She applied for and received statutory accident benefits from Personal Insurance Company of Canada ("Personal"), payable under the *Schedule*.¹ Personal denied Ms. Warvill's claim for a non-earner benefit. The parties were unable to resolve their disputes through mediation, and Ms. Warvill applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The issues in this hearing are:

1. Is Ms. Warvill barred from proceeding to arbitration in respect of her claim for a non-earner benefit pursuant to section 281 of the *Insurance Act* and section 51 of the *Schedule*?
2. Is Personal liable to pay Ms. Warvill's expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8?
3. Is Ms. Warvill liable to pay Personal's expenses in respect of the arbitration pursuant to subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8?

Result:

1. Ms. Warvill is barred from proceeding to arbitration in respect of her claim for a non-earner benefit.
2. The parties made no submissions with respect to expenses. I encourage them to resolve the issue, failing which they may request an expense hearing before me in accordance with the *Dispute Resolution Practice Code*.

BACKGROUND:

Ms. Warvill was involved in motor vehicle accidents on December 3, 2005 and March 9, 2006. She disputed Personal's denial of a non-earner benefit and an Examination Expense in respect of the March 2006 incident. At the outset of the hearing, Ms. Warvill advised that the examination expense is no longer in dispute. Therefore, the non-earner benefit remains the only issue in dispute.

PROCEDURAL RULING:

Ms. Warvill sought admission of documents related to the accident on December 3, 2005. Specifically, a Disability Certificate, (OCF-3), dated December 13, 2005; an Explanation of Benefits, (OCF-9), dated January 10, 2006; an OCF-9 dated January 31, 2006; a Medical Questionnaire dated February 12, 2006, a medical report dated May 27, 2006 and an OCF-9 dated June 23, 2006.² She submitted that the materials were relevant to the issue in dispute as the two incidents were only 4 months apart. As well, the manner in which Personal adjusted the two accidents is relevant to determining the issue of Ms. Warvill's eligibility to proceed to arbitration.

Personal submitted that the documents relating to the December 2005 accident were not relevant to a technical determination of whether Ms. Warvill is precluded from proceeding to arbitration because she failed to commence the arbitration within two years of Personal's denial of her claim for a non-earner benefit in respect of the March 2006 incident. Therefore, the documents should be excluded.

As, the two dates of loss were closely proximate to each other, I find that the Disability Certificate and both Explanations of Benefits are relevant to the manner in which Personal adjusted both dates of loss and they will be admitted. However, the medical reports at Tabs 4 and 5 are not relevant to the issue of the limitation period. Therefore, those two documents are excluded.

EVIDENCE AND ANALYSIS:

Personal refused to pay Ms. Warvill's claim for a non-earner benefit in a letter and an Explanation of Benefits (OCF-9) dated January 5, 2007. The letter identified the date of loss as occurring on March 9, 2006. It also stated that the denial was effective January 10, 2007.³

²Exhibit 2, Applicants Preliminary Brief of Authorities, Tabs 1, 2, 3, 4, 5 and 7

³Exhibit 1, Preliminary Issue Document Brief, Tabs 5 and 6

Personal submits that the denial was clear and unequivocal based on relevant medical reports which were enclosed with its letter to Ms. Warvill.⁴ As well, the Explanation of Benefits dated January 5, 2007 identified the “Date of Accident” as March 9, 2006. It provided the requisite information regarding Ms. Warvill’s right to dispute the denial, the process for disputing the denial and warned her that she was required to dispute Personal’s denial within two years. Ms. Warvill applied for Mediation on June 6, 2007.⁵ The Report of Mediator was issued on September 12, 2007.⁶ On February 23, 2009, Ms. Warvill’s Application for Arbitration was received by the Commission.⁷ Personal submits Ms. Warvill failed to commence the arbitration within 2 years of its denial. Further, she also failed to apply for Arbitration within 90 days of the Report of Mediator. Therefore, Ms. Warvill cannot benefit from the exception in subsection 281.1(2) of the *Insurance Act* or subsection 51(2) of the *Schedule* which provides a 90 day extension following the release of the Report of Mediator. Therefore, Ms. Warvill is barred from proceeding to arbitration.

Ms. Warvill submits that Personal’s denial was neither clear nor unequivocal. As Ms. Warvill had two claims which she was pursuing contemporaneously, as indicated by the Explanation of Benefits dated June 23, 2006, Personal had an obligation to clearly distinguish that the denial of the Non-Earner Benefit related to the March 9, 2006 date of loss.⁸ Merely identifying the Date of Loss or Date of Accident as March 9, 2006 was not sufficient. Personal’s failure to clearly distinguish the two claims renders its denial of Ms. Warvill’s claim for non-earner benefits invalid and therefore the limitation period did not commence to run.

⁴Exhibit 1, Preliminary Issue Document Brief, Tabs 2, 3 and 4

⁵Exhibit 1, Preliminary Issue Document Brief, Tab 7

⁶Exhibit 1, Preliminary Issue Document Brief, Tab 8

⁷Exhibit 1, Preliminary Issue Document Brief, Tab 9

⁸Exhibit 2, Applicants Preliminary Brief of Authorities, Tab 7

Subsection 281.1(1) of the *Insurance Act* provides:

A mediation proceeding or evaluation under section 280 or 280.1 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.

Subsection 281.1(2) provides the following exception:

Despite subsection (1), a proceeding or arbitration under clause 281(1)(a) or (b) may be commenced,

- (a) if there is an evaluation under section 280.1 within 30 days after the person performing the evaluation reports to the parties under clause 280.1(4)(b);
- (b) if mediation fails but there is no evaluation under section 280.1, within 90 days after the mediator reports to the parties under subsection 280(8).

Subsection 51(1) of the *Schedule* provides:

A mediation proceeding or evaluation under section 280 or 280.1 of the *Insurance Act* or a court proceeding or arbitration under clause 281(1)(a) or (b) of the Act in respect of a benefit under this Regulation shall be commenced within two years after the insurer's refusal to pay the amount claimed.

Subsection 51(2) provides:

Despite subsection (1), a court proceeding or arbitration under clause 281 (1) (a) or (b) of the *Insurance Act* may be commenced within 90 days after the mediator reports to the parties under subsection 280 (8) of the Act or within 30 days after the person performing the evaluation provides a report to the parties under section 280.1 of the Act, whichever is later.

I find that Personal's letter dated January 5, 2007 and its Explanation of Benefits of the same date were a clear and unequivocal denial of Ms. Warvill's claim for a non-earner benefit.

As well, the Explanation of Benefits provided Ms. Warvill with sufficient, clear and understandable information about her right to dispute the denial and the process for doing so.

As well, it provided a clear warning that she had to commence proceedings within 2 years of its denial.

Ms. Warvill applied for mediation on June 6, 2007.⁹ Her Application for Mediation identifies the date of the motor vehicle accident as March 9, 2006. The Report of Mediator dated September 12, 2007, identifies the date of the incident as March 9, 2006.¹⁰ I find Ms. Warvill appreciated and understood that Personal was denying her a non-earner benefit in respect of the accident on March 9, 2006 as she applied for Mediation in respect of that accident and that benefit. I also find that Ms. Warvill applied for Mediation less than 6 months following Personal's denial of the non-earner benefit on January 5, 2007. However, Ms. Warvill did not apply for Arbitration until February 23, 2009. This is two years, 1 month and 14 days following the effective date of Personal's denial. Ms. Warvill's date of Application for Arbitration is 1 year five months and 12 days following the release of the Report of Mediator on September 12, 2007 and therefore beyond the 90 days provided for in subsection 281.1(2) of the *Insurance Act* and subsection 51(2) of the *Schedule*. As Ms. Warvill applied for Arbitration beyond the two year limitation period and cannot benefit from the statutory exception she is barred from proceeding to Arbitration in respect of her claim for a non-earner benefit.

EXPENSES:

The parties made no submissions with respect to expenses. I encourage them to resolve the issue, failing which they may request an expense hearing before me in accordance with the *Dispute Resolution Practice Code*.

Denise Ashby
Arbitrator

December 29, 2010
Date

⁹Exhibit 1, Preliminary Issue Document Brief, Tab 7

¹⁰Exhibit 1, Preliminary Issue Document Brief, Tab 8



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JACQUELINE WARVILL

Applicant

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PERSONAL INSURANCE COMPANY OF CANADA

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ARBITRATION ORDER

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

1. Ms. Warvill is barred from proceeding to arbitration in respect of her claim for a non-earner benefit by operation of section 281 of the *Insurance Act* and section 51 of the *Schedule*.

Denise Ashby
Arbitrator

December 29, 2010

Date