

COURT FILE NO.: CV-07-01838SR
DATE: 20091214

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SUKHDEV GILL

Plaintiff

v.

ECONOMICAL INSURANCE COMPANY

Defendant

BEFORE: WEIN J.

COUNSEL: Mark A. Klaiman, for the Plaintiff

Jane Cvijan, for the Defendant

ENDORSEMENT

[1] The legal issue on this motion for Summary Judgment is whether or not the defendant Economical Insurance Company (“Economical”) issued a formal refusal to pay accident benefits such that the two year time limit set out in s.281.1(1) of the *Insurance Act* R.S.O. 1990 c.l.8 and paralled in subsection 51(1) of the Statutory Accident Benefits Schedule was triggered. It is common ground that the refusal referred to must be in “clear and unequivocal terms”: *Turner v. State Farm*, (2004), 184 O.A.C. 186 (S.C.J. (Div. Ct.)), (aff’d: (2005), 195 O.A.C. 61 (C.A.)).

The Facts

[2] The plaintiff's husband was a passenger in a truck that he normally drove for employment purposes. He died in a single vehicle accident that occurred in the United States. The plaintiff submitted a claim to Economical for death and funeral expenses in June 2006. Economical responded to the claim by way of a letter with attachments dated June 27, 2006. The issue is whether or not that letter and attachments constituted a refusal to pay triggering the time limits set out in the *Insurance Act* and *SABS*.

[3] In the letter, the claims representative stated:

"Our claims investigation indicates that your husband was acting in the course of his employment at the time of the motor vehicle accident. Therefore, he is eligible to receive workplace safety and insurance benefits."

[4] The letter then goes on to note that under s.59(2) of the *Statutory Accident Benefits Schedule* the plaintiff must elect to pursue a tort action in order to be eligible for benefits under the automobile legislation, and that she must submit other documents. Forms were enclosed, including an Explanation of Benefits payable, termed an OCF-9 form. Advice with respect to the dispute procedure in place relating to accident benefits indicating that if the plaintiff disagreed with the assessment and wished to dispute it, she could apply for mediation, is also given.

[5] In the Explanation of Benefits form, the amounts claimed for funeral expenses, travel expenses and death benefits is indicated. The amount payable is listed in each case as \$0. The column marked "item not payable" is left blank.

[6] Under the heading "Reasons Why Expenses are not Payable or Being Stopped", it is indicated:

We have received your application and expenses however, you must apply to worker's comp as per the attached letter. Once we receive the WSIB assignment ***we will be in a position to consider your claim.*** (emphasis added)

[7] That counsel for the plaintiff did not consider that they had received a refusal is apparent from the subsequent correspondence. By letter dated November 9, the assignment documents and a request for a processing of payments was sent. Additional requests for payment were made in October, 2006, April, 2007 and May, 2007. In the October letter Economical is requested to advise as to whether they would be paying the accident benefits *due under the terms of the policy*. Subsequently, the plaintiff issued a Statement of Claim as against Economical in which she sought payment of the disputed benefits. The claim was issued on June 8, 2007 and the Statement of Defence was filed on February 19, 2008. No mediation proceeding has been commenced by the plaintiff.

Positions

[8] Economical asserts that the refusal to pay for the disputed benefits was clear from the materials sent June 27, 2006 and that adequate reasons were given in accordance with the requirements of *Smith v. Co-Operators*, [2002] 2 S.C.R. 129. In *Smith* the court made clear that in addition to notice of refusal, the insurer must also provide the insured with reasons for the refusal. The limitation period does not run until both written notice of refusal and the reasons for the refusal have been given: *Turner v. State Farm*, supra.

[9] It is clear that the mere filing of a Statement of Claim prior to mediation is irrelevant to the issue in this case: See *Petrie v. Downey Mutual Insurance Company*, [2004] O.J. No. 3233 (S.C.) following *Hussaini v. State Farm* (1999), 11 C.C.L.I. (3d) 194 (S.C.). There is no case law directly on point of the issue in question here.

[10] Counsel for Economical asserts that although the letter of June 27, 2006 does not explicitly refer to a “refusal”, that is the clear intent. It is suggested that the reference to \$0 under amount payable is an unequivocal refusal to pay. It is argued that the references to benefits under the automobile legislation are simply provided in accordance with the statutory requirement that the complainant be

notified of the provisions of s.59(2). I cannot agree that this is a clear refusal. The reference to “being eligible to receive workplace safety and insurance benefits” is not a direct refusal of benefits under the automobile legislation. Indeed, it is suggested to the plaintiff that to get those benefits she should submit documents, which she did, including a copy of the Statement of Claim when later available. The final reference to a possible “disagreement with the above assessment” supports the defendant’s position, but does not make the refusal unequivocal. Finally, and perhaps most significantly, the additional reference in the OCF-9 suggesting that once they receive the assignment documents “we will be in a position to consider your claim”, also suggests that there has not been an unequivocal refusal. The reference to a denial of the claim for statutory accident benefits follows that explanation, and thereby suggests that there will be a further determination made.

[11] As well, the warning with respect to the two year time limit is generic, and does not clarify that the insurance company is taking the position that the time limit runs from the date of the letter. It is simply a boilerplate copy of a list of rights to dispute. Following that, in the assignment of benefits, it is noted that the claimant may have a right to benefits from a motor vehicle insurance company.

[12] Clearly, the materials sent by Economical are open to interpretation and therefore cannot be said to be clear and unequivocal. There is no reason why a covering letter could not simply indicate that the letter constitutes a refusal pursuant to the relevant legislation, with reasons given, followed by a reference to the two year limitation period and commencement date. That would be clear and unequivocal, and fair to both parties.

[13] While the subsequent letter sent by the plaintiff's counsel can be interpreted as being either a request for final refusal, or a request for payment of the assigned benefits, Economical could and should have been alerted to the realistic possibility that the plaintiff was awaiting a refusal of the claim, as opposed to simply awaiting assigned benefits.

[14] Accordingly, since there has been no clear and unequivocal refusal, the limitation period does not apply to make the actions statute barred. While the court action cannot proceed before mediation, a clear refusal can still be given which would trigger the two year time period for going to mediation, and then potentially to trial on the action.

[15] The motion for summary judgment accordingly must be dismissed.

Costs

[16] Counsel have indicated that they expect to be able to resolve the issue of costs between themselves. If not, I will receive written submissions as to costs, with the plaintiff's being provided to the defendant by December 24, 2009 the defendant's to the plaintiff by January 10, 2010 and the plaintiff's reply, if any, by January 17, 2010, at which time all submissions will be bound together in a single cost submission and filed with the court office. Submissions will each be a maximum of four pages, double spaced, plus attachments, with reply being limited to two pages.

Wein J.

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