

BETWEEN:

ALEXANDER VON STEUN

Applicant

and

CANADIAN GENERAL INSURANCE GROUP

Insurer

DECISION on a PRELIMINARY ISSUE

Issues:

The Applicant, Alexander Von Steun, was injured in motor vehicle accidents on January 19, 1994, August 1, 1996 and January 21, 1997. He applied for statutory accident benefits from Canadian General Insurance Group (“Canadian General”), payable under the *1994 Schedule*¹ and the *1996 Schedule*.² The parties were unable to resolve their disputes through mediation at the Ontario Insurance Commission (“the Commission”) in June 1996, and Mr. Von Steun applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. At a private mediation held on December 12, 1997, the parties reached an agreement with respect to all the issues in dispute

¹The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993, and before November 1, 1996*, called “the *1994 Schedule*” in this decision. The *Schedule* is Ontario Regulation 776/93, as amended by Ontario Regulation 635/94

²The *Statutory Accident Benefits Schedule - Accidents after November 1, 1996*, called “the *1996 Schedule*” in this decision. The *Schedule* is Ontario Regulation 403/96

in the arbitration proceeding. On January 7, 1998, the Applicant notified the Insurer that he wished to rescind the agreement. The Insurer submits that the two-day “cooling off period” set out in paragraph 9.1(3) of Regulation 664 as amended (“the settlement regulation”) had expired before January 7, 1998 and that the agreement between the parties had become a final and binding settlement by that date.

The only issue in this hearing is:

1. Did the parties enter into a final and binding settlement of the issues in dispute?

Mr. Von Steun also claims his arbitration expenses incurred in the hearing.

Result:

1. The parties did not enter into a final and binding settlement of the issues in dispute because the Applicant rescinded their tentative settlement. The Applicant may proceed to arbitration.
2. The Applicant is entitled to his expenses of this preliminary issue hearing.

Hearing:

The hearing was held at the offices of the Ontario Insurance Commission in North York, Ontario, on February 9, 1998, before me, Nancy Makepeace, Arbitrator. Mr. David Hayward, Barrister and Solicitor, represented the Applicant, and Mr. Wayne Edwards, Barrister and Solicitor, represented the Insurer. Neither principal appeared. There were no witnesses. The parties presented an Agreed Statement of Facts (Exhibit 1). The Applicant also filed a Case Brief.

Evidence and Findings:

There was no dispute about the main facts giving rise to this dispute, which are as follows.

1. On Friday, December 12, 1997, at a private mediation, the parties reached an agreement with regard to the issues in dispute in this arbitration. The Applicant attended, represented by Mr. Hayward and Mr. Bruce Hillyer, another lawyer in the same firm. Mr. Hayward and Mr. Edwards signed Minutes of Settlement³ but no release or disclosure notice were prepared or signed that day.
2. By letter faxed to Mr. Hayward on Monday, December 22, 1997, Mr. Edwards forwarded a release for the Applicant's signature and the disclosure notice required by the settlement regulation.⁴
3. Unbeknownst to Mr. Edwards, Mr. Hayward and Mr. Hillyer were both away from the office on Christmas vacation from December 22, 1997 to Monday, January 5, 1998.
4. On January 5, 1998, Mr. Hayward's office called the Applicant and told him that the release and disclosure notice had been received. The Applicant made an appointment to review the documentation with Mr. Hayward on January 7, 1998.

³Exhibit 1, Tab 2

⁴Exhibit 1, Tab 3

5. This was the Applicant's first opportunity to review the release and disclosure notice. Mr. Hayward advised Mr. Edwards about the Applicant's decision to rescind the agreement by letter faxed the same day.⁵
6. Mr. Edwards sent a cheque for the settlement funds by courier on January 13, 1998, along with a letter in which he set out the Insurer's position that the parties had entered into a binding settlement.⁶ On the same day, Mr. Hayward returned the cheque by overnight courier, along with a letter reiterating the Applicant's position that he had rescinded the settlement.⁷

The parties agreed that at common law they reached a binding settlement on December 12, 1997, when Mr. Hayward and Mr. Edwards signed Minutes of Settlement. They also agreed that subsection 9.1(3) of the settlement regulation amends the common law. That provision is as follows:

A settlement may be rescinded by the insured person, within two business days *after the settlement is entered into*, by delivering a written notice to the insurer.
[emphasis added]

The main issue in this case is when "the settlement [was] entered into." The Insurer submitted that for the purpose of the settlement regulation, the parties settled the matter on December 12, when they signed Minutes of Settlement, or (alternatively) December 22, when the Insurer faxed the release and disclosure notice to Mr. Hayward. The Applicant submitted that the settlement could not have been entered into before January 7, when the Applicant first received and reviewed the disclosure notice.

⁵Exhibit 1, Tab 4

⁶Exhibit 1, Tab 6

⁷Exhibit 1, Tab 7

As several arbitrators have noted, the settlement regulation uses the word “settlement” in two senses. Subsection 9.1(1) defines “settlement” as “an agreement between an insurer and an insured person that *finally* [emphasis added] disposes of a claim or dispute in respect of the insured person’s entitlement to one or more benefits under the *Statutory Accident Benefits Schedule*.” Subsections 9.1(2) and 9.1(5) also use “settlement” to mean “final settlement.” Subsection 9.1(5) provides that a restriction on an insured person’s right to mediate, litigate, arbitrate, appeal or apply to vary an order as provided in sections 280 to 284 of the *Act* is valid only if the restriction is contained in a *settlement*” and “the insurer *complied* with subsection (2)” [emphasis added]. I find that use of the past tense - “complied” - in subsection 9.1(5) is consistent with subsection 9.1(2), which requires the insurer to give the required notice “[B]efore a settlement is entered into ...” These provisions, when read together, indicate that the drafters of the settlement regulation intended the insurer to give the disclosure notice before the insured person enters into a settlement disposing of his right to commence legal proceedings about the issues in dispute.

However, in subsection 9.1(4), “settlement” seems to mean the agreement reached by the parties *before* the insurer provides the disclosure notice described in subsection 9.1(2). In this sense, a “settlement” is a “tentative settlement”:

If the insurer did not comply with subsection (2), the insured person may rescind the *settlement* after the period mentioned in subsection (3) ...

In my view, the ambiguity in these provisions is resolved by reference to the remedial purposes of the settlement regulation. Arbitrator McMahon described the two functions of the regulation in *Soordhar and Citadel*:⁸

Firstly, it requires the insurer to prepare and give to the insured person a written notice that contains, amongst other things, a description of the benefits which

⁸*Soordhar and Citadel General Assurance Company* (December 5, 1995), OIC A-006428, Tab 2 of Applicant’s Case Brief

might be available to the insured person, a description of the settlement terms including an estimate of the commuted value of any lump sum, a description of the impact of the settlement on the insured persons [sic] entitlement to further benefits and a statement advising the insured person to seek legal, financial and medical advice before entering into the settlement. Secondly it provides for a cooling off period of two business days within which the insured person may rescind any settlement entered into.

In *McLennon and Pilot*,⁹ Arbitrator Friendly made the following comments about the remedial intent of the regulation, which I accept:

In my view, the *Settlement Regulation* is a form of consumer protection legislation intended to protect insureds by prescribing certain disclosure and rescission rights. Following proper disclosure by an insurer, an insured has two full days to review the settlement and consider, with sober second thought, whether the bargain struck in the heat of negotiation remains suitable. The disclosure requirement does not by itself protect the interests of insureds. To make this right valuable, there must also be time and space to adequately consider what has been disclosed. Disclosure without a period of contemplation and a real right to rescind defeats the intended purpose of the Regulation.

On this basis, I have no hesitation in finding that the parties did not enter into a settlement on December 12, 1997, because the required disclosure notice was not available for the Applicant's review at that time.

The Insurer's alternative position is that the parties entered into a settlement on December 22, when Mr. Edwards faxed the notice to Mr. Hayward. The Insurer submits that notice to Applicant's counsel is notice to the Applicant. There is some appeal to this position because represented parties communicate with each other through their counsel, rather than communicating directly.

⁹*McLennon and Pilot Insurance Company* (May 8, 1997), OIC A96-001499, Tab 5 of Applicant's Case Brief

However, the requirement in subsection 9.1(2) that notice be given to “the insured person” is consistent with the underlying legislative objective that the accident benefit and dispute resolution scheme should be relatively informal and “user-friendly” for unrepresented insured persons. I agree with Mr. Hayward that the drafters’ choice of the word “give” rather than “serve” suggests that they wanted to avoid any ambiguity which that more technical term might suggest. More significantly, the settlement regulation is intended to protect the insured person, not his counsel. Arbitrator McMahon, dealing with the same argument in *Soordhar*, said: “If the delivery of the notice to the insured’s counsel is effectively giving it to the insured, then the period of contemplation becomes purely illusory ...”. I agree. This interpretation imposes some uncertainty in the settlement process, since the Insurer cannot determine and may not know when the Insured’s counsel will meet with his or her client. In my view, it is a risk the Insurer must bear, given the remedial character of the regulation. In any event, it is a risk that is easily averted by good communication between co-operative counsel.

Accordingly, I find that the two-day cooling off period did not begin until January 7, 1998, when the Applicant first received and reviewed the disclosure notice with Mr. Hayward. He gave written notice through counsel that day, effectively rescinding the tentative agreement reached on December 12, 1997.

Was the disclosure notice deficient?

Paragraph 9.1(2)5 says that if the settlement provides for the payment of a lump sum in settlement of a claim for a periodic benefit, the disclosure notice must contain “a statement of the insurer’s estimate of the commuted value of the benefit and an explanation of how the insurer determined the commuted value.” Mr. Hayward submitted that the notice was deficient in that it did not contain information as to discount rate, life expectancy and present value of future weekly

benefits. He relied on the decision *Arabpour and Allstate*,¹⁰ in which Arbitrator Palmer set aside a settlement because the disclosure notice was deficient in the same respect.

Mr. Edwards submitted that the Applicant was not prejudiced by this omission since he was represented by counsel who could provide him with this information.

Given my finding that the parties' agreement was rescinded by Mr. Hayward's letter of January 7, 1998, it is not necessary for me to decide this issue. However, in the event that my finding on the first issue is wrong, I find that the Insurer's disclosure notice was deficient in the ways noted by Mr. Hayward. As Arbitrator McMahon and others have noted, one purpose of the settlement regulation is to provide insureds with the information they need to assess the settlement during the cooling off period. Few insureds would be able to assess the value of a lump sum offer in the absence of the "explanation of how the insurer determined the commuted value," including the information omitted from the notice given by this Insurer. This was not just a technical or formal defect but one that could undermine the insured person's ability to assess the value of the settlement.

I do not accept Mr. Edwards' submission that the omission may be overlooked when an insured is represented. As stated above, the preamble to subsection 9.1(2) of the regulation states that the insurer "shall give *the insured person* a written notice ...", including "a statement of the insurer's estimate of the commuted value of the benefit and an explanation of how the insurer determined the commuted value." No exception is made for insureds who are represented by counsel, and the provision is clearly mandatory.

¹⁰*Arabpour and Allstate Insurance Company* (October 1, 1996), A96-000773, Tab 4 of Applicant's Case Brief. On appeal, the arbitration order was rescinded because the issue of the adequacy of the disclosure notice had not been raised at any stage of the arbitration process and accordingly the insurer had not been given reasonable opportunity to address the issue. The Director's Delegate expressed no opinion about the adequacy of the notice, but referred the matter back for rehearing by another arbitrator. P96-00078, March 13, 1997, Tab 7 of Applicant's Case Brief

Expenses:

The Applicant is entitled to his expenses of this preliminary issue hearing, subject to the Expense Schedule.

Order:

1. The Insurer's motion is dismissed. The arbitration hearing may proceed as scheduled.
2. The Insurer shall reimburse the Applicant for his expenses of this preliminary issue proceeding, subject to the *Expense Schedule*. If the parties are unable to agree on the amount payable, the dispute may be brought before an Arbitrator for determination in accordance with the process set out in rule 77 of the *Dispute Resolution Practice Code* (April 15, 1997).

Nancy Makepeace
Arbitrator

March 18, 1998

Date