



FSCO A13-004423

BETWEEN:

KUMUTHAKUMARY KULAVEERASINGAM

Applicant

and

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

Insurer

REASONS FOR DECISION

Before: Deborah Pressman

Heard: July 28, 2014, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: David S. Wilson for Ms. Kulaveerasingam
Katie McBride for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Kumuthakumary Kulaveerasingam, was injured in a motor vehicle accident on October 29, 2010. She claimed statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”) under the new *Statutory Accident Benefits Schedule* — *Effective September 1, 2010* (“*New Schedule*”).¹ After her Income Replacement Benefit (IRBs) claim was denied and mediated, Ms. Kulaveerasingam applied for arbitration at the Financial

¹Ontario Regulation — 34/10, as amended.

Services Commission of Ontario.² Shortly before her arbitration hearing, State Farm reinstated her IRBs.

The following issues remain in dispute:

1. Is Ms. Kulaveerasingam entitled to ongoing Income Replacement Benefits?
2. Is Ms. Kulaveerasingam entitled to interest for the overdue payment of benefits pursuant to the *New Schedule* at the rate of 1 per cent or the *Old Schedule*, at the rate of 2 per cent per month, compounded monthly?

Result:

1. Ms. Kulaveerasingam is entitled to ongoing IRBs at the rate of \$400.00 per week.
2. Ms. Kulaveerasingam is entitled to interest for the overdue payment of benefits pursuant to the *New Schedule*, at the rate of 1 per cent per month, compounded monthly.

ANALYSIS:

Ongoing IRBs

Shortly before the arbitration hearing, State Farm reinstated Ms. Kulaveerasingam's IRBs and agreed to pay for arrears owing, including interest. But the parties disagreed on whether this was an "agreement" or a unilateral decision by State Farm. Ms. Kulaveerasingam requested an order with respect to her entitlement to ongoing IRBs. State Farm opposed the need for such an order.

²Under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

Where there exists an arbitrator's order (by agreement or after a hearing), an insurer cannot reduce or terminate benefits to an insured, without first obtaining a further order by applying for a variation or an appeal, as per Sections 284 and 287 of the *Insurance Act*.³ To receive the full benefit and protection of the arbitration process, afforded by the *Insurance Act*, Ms. Kulaveerasingam proceeded with her arbitration hearing.

Ms. Kulaveerasingam presented evidence that she meets both the pre-104 and post-104 disability test for IRBs which included a medical brief⁴ and testimony. State Farm did not cross-examine Ms. Kulaveerasingam and did not present sufficient evidence to disentitle her from ongoing IRBs.⁵ Significantly, State Farm conceded that she is entitled to IRBs.

Therefore, I find that Ms. Kulaveerasingam satisfies the test of entitlement to ongoing IRBs.

Interest under the *New Schedule*

An amendment to the *New Schedule* reduces the interest rate to be paid by an insurer on overdue payment of benefits from 2 per cent, under the *Old Schedule* to 1 per cent.⁶

The new and reduced interest provision affects the coverage provided in existing policies because the *New Schedule* is "***effective September 1, 2010***" and not simply applicable to accidents on or after September 1, 2010. [emphasis mine]

³*Allstate Insurance Company of Canada and Simpson* (FSCO P01-00057, June 6, 2003), Appeal, and *Nelson and Liberty Mutual Insurance Company* (FSCO A00-000253, November 8, 2001).

⁴Exhibit 1, Exhibit 2 and Exhibit 3.

⁵State Farm requested to submit into evidence a medical brief (at Exhibit 4) after Ms. Kulaveerasingam's closing argument. Ms. Kulaveerasingam objected. I admitted State Farm's brief into evidence because the documents were served pursuant to the *DRPC* and did not prejudice the applicant's case given State Farm's concession on entitlement.

⁶Under section 46(2) of the *Statutory Accident Benefits Schedule (Accidents on or after November 1, 1996)*, Ontario Regulation 403/96, as amended ("*Old Schedule*"), an insurer was required to pay interest on overdue payment of benefits at the rate of 2 per cent per month..." Section 51(2) of the *New Schedule* mirrors section 46(2) of the *Old Schedule*, except that the rate of interest is reduced to 1 per cent per month, compounded monthly.

The *New Schedule* deals with policies existing at the time it came into effect under sections 2 and 68. Section 2 states:

Application and transition rules

- 2(1) Except as otherwise provided in section 68, the benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010.

I find the language in section 2(1) to be unambiguous and clear — if a motor vehicle accident occurs on or after September 1, 2010, then the statutory accident benefits provided are subject to the *New Schedule*, with the only exception outlined in section 68.

Section 68 preserves the availability of specific benefits to claimants involved in an accident after September 1, 2010 whose policies have yet to expire.⁷ But section 68 does not preserve entire benefits and processes from the *Old Schedule*. Instead, section 68(2) deems specific benefits to be included and available to a claimant with a transitional policy as optional benefits outlined further in section 28.⁸

Significantly, neither section 68 nor 28 makes any mention of interest. Therefore, I find that interest is neither included nor available as an optional benefit under section 68 and does not form part of exception referenced in section 2(1).

FSCO’s non-binding bulletin⁹ on the transition to the *New Schedule* states that the *New Schedule* will apply to all accidents after September 1, 2010 and holders of transitional policies will find the amounts of their benefits unchanged (from the *Old Schedule*). I do not interpret the bulletin’s

⁷According to section 68(1), a transitional policy is a motor vehicle liability policy that is in effect on September 1, 2010 until the earlier of its expiry date or its termination. The parties agree that Ms. Kulaveerasingam’s automobile policy with State Farm qualifies as a “transitional policy” under the *New Schedule*.

⁸Section 28 makes further references to other provisions also in the *New Schedule*.

⁹*Transition to the New Statutory Benefits Schedule — Effective September 1, 2010*, dated April 26, 2010.

section of “Coverage and Coverage Limits” as a reference to the preservation of entire benefits and requirements, as they were under the *Old Schedule*. In my opinion, the bulletin supports my view of how section 2 and section 68 are to be read and applied to transitional policies.

I find the statutory provisions of the *New Schedule*, as they apply to existing policies to be clear. There is sufficient indication in the transitional provisions that claims for benefits arising out of accidents post September 1, 2010 will be dealt with under the *New Schedule*. This includes a claim for interest on overdue payment of benefits, which is now subject to the new and reduced 1 per cent rate outlined in section 51 of the *New Schedule*.

In my opinion, the legislature’s choice of words in its application and transition provisions is determinative of its intent for the *New Schedule* to apply to all accidents occurring on or after September 1, 2010. If the intention of the legislature was that an insurer would not be subject to the new and reduced interest provision in the *New Schedule*, that could have been specified, and it was not.

I also agree that the legislative change to the interest provision is a substantive amendment and that it is subject to the presumption against retroactive application.¹⁰ But this does not decide the issue.

The real question is when does an accident benefits claim become sufficiently concrete for a substantive right to materialize? According to Director’s Delegate Blackman in *State Farm Mutual Automobile Insurance Company and Federico*¹¹, an accident benefits claim becomes sufficiently concrete for a right to materialize on the date of the accident. This is a reasonable conclusion as accident benefits are not provided or claimed until an accident occurs.¹² Therefore,

¹⁰An ambiguous and unclear legislative amendment will not apply retroactively to substantive rights. See *Gustavson Drilling (1964) Ltd. V. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271. R. Sullivan, *Driedger on the Construction of Statutes*, 5th Ed. (Toronto: Lexis Nexis, 2009), *Dikranian v. Quebec (Attorney General)* [2005] 3 S.C.R. 530

¹¹(FSCO P12-00022, June 22, 2012), Appeal, affirming and upheld by Divisional Court.

¹²I reject Ms. Kulaveerasingam’s submission that I should focus on the first sentence in paragraph 59 of the *Federico* appeal decision and that the second sentence is irrelevant. This is not a sensible approach to interpreting case law.

for Ms. Kulaveerasingam, the earliest date in which her claim materializes is October 29, 2010, the date of her accident, when the *New Schedule* was already in effect.

Ms. Kulaveerasingam submitted that I may infer the application of the 2 per cent interest provision from the *Old Schedule* because it was part of the premium packages that she purchased.¹³ She also submitted that the *New Schedule* cannot reach back in time and interfere with an insured's contractual expectation because that would be unfair.

I agree that the contract of insurance between Ms. Kulaveerasingam and State Farm created rights and obligations as soon as it was formed. However, the terms of Ms. Kulaveerasingam's automobile policy are not fixed for its entire duration. This is because the legislature may amend her benefits pursuant to section 268 of the *Insurance Act* through clear and unambiguous statutory provisions.

In this case, Ms. Kulaveerasingam has no vested right to the higher interest rate provided under the *Old Schedule* because her right to claim accident benefits materialized and became sufficiently concrete on the day of her accident, October 29, 2010, a month after the *New Schedule* was in effect.

Therefore, Ms. Kulaveerasingam's claim for interest on overdue payment of benefits is subject to the *New Schedule* and she is entitled to the 1 per cent interest rate outlined in section 51 under the *New Schedule*.

¹³In her submissions she relies on *Attavar v. Allstate Insurance Company of Canada* 63 O.R. (3d) 199, a 2003 court of appeal case. But the issue in *Attavar* is not on point. *Attavar* deals with when a payment becomes overdue.

EXPENSES:

Expenses were not addressed at the hearing. In the event the parties are unable to resolve this issue, either party may request that I determine entitlement to or the amount of the expenses, in accordance with Rule 79 of the *DRPC*.

Deborah Pressman
Arbitrator

February 6, 2015
Date



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KUMUTHAKUMARY KULAVEERASINGAM

Applicant

and

**STATE FARM MUTUAL AUTOMOBILE
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Insurer

ARBITRATION ORDER

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

1. Ms. Kulaveerasingam is entitled to ongoing Income Replacement Benefits at the rate of \$400.00 per week.
2. Ms. Kulaveerasingam is entitled to interest for the overdue payment of benefits pursuant to section 51 of the *Statutory Accident Benefits Schedule — Effective September 1, 2010* (“*New Schedule*”) at the rate of 1 per cent per month, compounded monthly.

Deborah Pressman
Arbitrator

February 6, 2015
Date