



FSCO A14-009220

BETWEEN:

MURAT CANKAYA

Applicant

and

UNIFUND ASSURANCE COMPANY

Insurer

AND

FSCO A14-009222

BETWEEN:

MURAT CANKAYA

Applicant

and

INTACT INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Marshall Schnapp

Heard: By written submissions due July 15, 2016

Appearances: Mr. Stanley B. Pasternak for Mr. Murat Cankaya
Mr. Arthur R. Campoprese for Unifund Assurance Company
Mr. Doug Wallace for Intact Insurance Company

Issues:

The Applicant, Mr. Murat Cankaya, was injured in a motor vehicle accident on January 3, 2014 and sought accident benefits from Unifund Assurance Company (“Unifund”), payable under the *SABS*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Cankaya applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The issues in this Preliminary Issue Hearing are:

1. Does FSCO have jurisdiction to consider and determine whether or not the exclusion set out in Section 1.8.4. of the Ontario Standard Auto Policy (OAP 1) can relieve Unifund of its obligation to respond/adjust the Applicant's application for statutory accident benefits as provided by Section 2.1(6) of O. Reg. 283/95 - Disputes Between Insurers?
2. If the answer to Issue 1 is no, is Unifund obliged to respond/adjust the Applicant's application for statutory accident benefits?
3. If the answer to Issue 1 is yes, does the exclusion set out in Section 1.8.4. of the Ontario Standard Auto Policy (OAP 1) preclude the Applicant from receiving statutory accident benefits from Unifund?
4. If the answer to Issue 1 is yes, has Unifund waived its right to rely upon Section 1.8.4. and/or is it estopped from doing so as a result of its decision not to commence a priority dispute against Intact pursuant to O. Reg. 283/95?
5. If the Applicant is precluded from statutory accident benefits from Unifund because of the exclusion clause set out in Section 1.8.4. of the Ontario Standard Auto Policy (OAP 1), is Intact obliged to respond/adjust the Applicant's application for statutory accident benefits?
6. If the answer to Issue 5 is no, should the Application against Intact be dismissed?

Result:

¹ *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

1. FSCO does not have jurisdiction to consider and determine whether or not the exclusion set out in Section 1.8.4. of the Ontario Standard Auto Policy (OAP 1) can relieve Unifund of its obligation to respond/adjust the Applicant's application for statutory accident benefits as provided by Section 2.1 (6) of O. Reg. 283/95 - Disputes Between Insurers.
2. Unifund is obliged to respond/adjust the Applicant's application for statutory accident benefits.
3. This need not be considered due to my finding on Issue 1.
4. This need not be considered due to my finding on Issue 1.
5. This need not be considered due to my finding on Issue 1.
6. The Application against Intact is not dismissed.

EVIDENCE AND ANALYSIS:

Background

The following facts were contained in the Agreed Statement of Facts provided by the parties.

On January 3, 2014, Mr. Cankaya was listening to the engine of a 2001 BMW vehicle he was about to repair at his mechanic shop called Auto Master Service when the cooling fan or other part of the said 2001 BMW broke apart and flew into his face. As a result of this, he sustained multiple injuries. Mr. Cankaya was acting in the course of his self-employment as a garage repairman when the incident occurred.

At all material times, Mr. Cankaya held a valid Ontario Automobile Policy (OAP 1) with Unifund on his 2001 Mazda vehicle.

At all material times, Mr. Cankaya held a valid Ontario Garage Automobile Policy (OAP 4) with Intact Insurance Company ("Intact") and the policy contained coverage for statutory accident benefits.

Mr. Cankaya completed an Application for Accident Benefits (OCF-1) on January 10, 2014 and submitted same to Unifund.

On March 27, 2014, Unifund sent an Explanation of Benefits (OCF-9) to Mr. Cankaya advising that he was precluded from accident benefit coverage by the exclusions in Section 1.8.4 of the OAP 1.

On April 15, 2014, Mr. Cankaya's lawyer wrote to Unifund and advised that Mr. Cankaya had a commercial liability policy covering his repair shop with Intact. Apparently, when Mr. Cankaya spoke with his broker shortly after the incident, the broker advised him that the Intact insurance policy did not cover him for injuries sustained. Counsel for Mr. Cankaya advised he would leave it up to Unifund to investigate the Intact insurance policy.

Unifund has not commenced a priority dispute under Ontario Regulation 283/95 as against Intact, and the time for doing so has expired.

Mr. Cankaya then completed an Application for Accident Benefits (OCF-1) on June 18, 2014 and submitted same to Intact. Intact denied the Application for Accident Benefits (OCF-1) on the basis that it was not the first Insurer to receive a completed OCF-1.

Given the results of my decision, it is only necessary for me to deal with Issues 1, 2, and 6.

Mr. Cankaya's Position on Issue 1

Mr. Cankaya notes that Unifund does not deny that it insured his motor vehicle on the date of the incident, January 3, 2014, and that it was the first Insurer to receive an Application for Accident Benefits under the *SABS* from Mr. Cankaya. As well, on February 9, 2016, Unifund conceded that there is a nexus (a nexus being some connection that is not totally random or arbitrary) between it and Mr. Cankaya. Thus, Mr. Cankaya takes the position that Unifund has admitted all of the necessary essential facts which should have resulted in Unifund responding to and commencing paying him any benefits to which he was entitled. Unifund's obligation to

commence the payment of benefits arises from O. Reg. 283/95, *Disputes Between Insurers* a regulation under the *Insurance Act*, O. Reg. 283/95 (“Priorities Regulation”).²

Mr. Cankaya submits that FSCO does not have jurisdiction to determine issues of coverage, i.e. was the injured person covered or not covered under a particular automobile insurance policy, nor does it have jurisdiction to choose which of two or more Insurers should be paying accident benefits. Those issues are only to be dealt with by way of private Arbitration under the Priorities Regulation.

In support of these submissions, Mr. Cankaya referred to several decisions including *McGregor and ING Insurance Company of Canada*.³ In this case, Ms. McGregor was injured in an automobile accident on December 7, 2005, while driving a car that was registered in Quebec and insured with ING Insurance Company (“ING”) out of Quebec. Other cars involved in the accident were insured with State Farm Mutual Automobile Insurance Company, RBC General Insurance Company and Personal Insurance Company of Canada. Ms. McGregor applied to ING for accident benefits. ING took the position that her insurance policy purchased in Quebec contained only property damage coverage and did not provide for statutory accident benefits. ING initiated priority disputes with the Insurers of the other cars involved in the accident and the Ontario Motor Vehicle Accident Claims Fund. ING refused to pay any benefits to Ms. McGregor.

A Preliminary Issue Hearing was held before Arbitrator Alves. She was to determine whether or not an Arbitrator should determine if Ms. McGregor met the definition of insured person under the *SABS* or whether that issue should be determined by a private Arbitrator appointed under the *Arbitration Act, 1991* as part of a priorities dispute.

² O. Reg. 283/95.

³ FSCO A07-001712, July 4, 2008.

Arbitrator Alves relied on the decision of Director's Delegate Draper in the *Vieira and Royal & Sunalliance Insurance Company of Canada and Chubb Insurance Company of Canada*⁴ case and found that the issue of whether or not Ms. McGregor was an insured person should be determined as part of the priorities dispute and that FSCO should only be determining Ms. McGregor's entitlement to her various statutory accident benefits.⁵

Another decision being relied on is *Bianca and Wawanesa Mutual Insurance Company*,⁶ where Arbitrator Slotnick held that it was not necessary for him to decide if an Applicant was insured with Wawanesa as that issue would be relevant only in the context of a priorities dispute and FSCO Arbitrators did not have jurisdiction to determine coverage issues.

Mr. Cankaya also notes that this issue was again dealt with by Director's Delegate Draper in the *Vieira*⁷ decision. The Applicant was a pedestrian waiting for a bus when she fell and injured herself while trying to avoid several oncoming vehicles. She applied for accident benefits to Royal & SunAlliance Insurance Company ("Royal"), which insured her son's automobile. The Applicant had mistakenly believed she had coverage under her son's policy. Eventually, Royal raised the preliminary issue of whether or not Mrs. Vieira was an insured person under its policy because this was a "coverage" issue and not a priority dispute with another insurance company.

The decision clearly states that the Priorities Regulation, O. Reg. 283/95 was enacted for the purpose of ensuring the timely payment of benefits would not be delayed because of a dispute between insurance companies as to which one was the correct one to be paying benefits. In his decision, Director's Delegate Draper stated: "Mrs. Vieira finds herself caught between two insurers, each claiming the other is responsible for paying her accident benefits - precisely the situation the *Priorities Regulation* was meant to eliminate."⁸

⁴ *Vieira and Royal & Sunalliance Insurance Company of Canada and Chubb Insurance Company of Canada* (FSCO Appeal P04-00016, February 15, 2005).

⁵ *Supra*, note 3, at p. 2.

⁶ FSCO A03-001571, December 20, 2004.

⁷ FSCO Appeal P04-00016, February 15, 2005.

⁸ *Ibid.*, at p. 6.

The decision goes on to state “insurers are required to participate in a scheme designed to ensure that injured persons will get a prompt determination of their entitlement to the accident benefits, even if they have chosen the wrong insurer.”⁹ And most important to this matter, the decision goes on to state the following:

All disputes about which insurer must pay the benefits - the *who pays* question - are decided under the *Priorities Regulation*. This leaves FSCO arbitrators and judges to determine entitlement C the *what, if any, benefits* question. In other words, if the insurer before a FSCO arbitrator was the first insurer to receive a completed application, the arbitrator's role is to determine what benefits that person is entitled to receive under the *SABS*, without regard to whether he or she is covered by that particular policy.¹⁰

Mr. Cankaya highlights that Director's Delegate Draper's decision in *Vieira* has never been overruled, is binding on FSCO Arbitrators, and is dispositive on the issue of FSCO's lack of jurisdiction to adjudicate coverage issues.

Mr. Cankaya's Position on Issue #2

Unifund has admitted to all of the requisite facts obliging it to have responded to Mr. Cankaya's application for statutory accident benefits. Unifund has conceded the following:

- 1) There was a valid policy of automobile insurance in place between itself and Mr. Cankaya on the date of loss;
- 2) There is a nexus between Unifund and Mr. Cankaya;
- 3) Unifund was the first automobile Insurer to have received a completed Application for Accident Benefits from Mr. Cankaya; and
- 4) Unifund did not access O. Reg. 283/95 to dispute its obligation to pay accident benefits to Mr. Cankaya.

⁹ *Ibid.*

¹⁰ *Ibid.*, at p. 11.

Based on the above the admissions, Unifund is obliged to respond/adjust the Applicant's application for statutory accident benefits.

Mr. Cankaya's Position on Issue 6

On the date of loss, Mr. Cankaya had valid insurance with both Intact and Unifund and they both had a duty of utmost good faith to him. There is no reason why Intact could not have accepted Mr. Cankaya's claim when he submitted his Application for Accident Benefits. After starting to adjust the claim, Intact could have then commenced a priority dispute against Unifund.

Mr. Cankaya is aware that he cannot receive benefits under the *SABS* from two Insurers; however, he is permitted to receive the benefits he is entitled to from either Unifund or Intact. Once it is determined, after all Appeal periods have expired, which Insurer is responsible to pay him benefits and once that responsibility is acknowledged and acted upon by the Insurer, it will not be necessary to continue proceedings against the other Insurer. However until the final determination is made on which Insurer is responsible to pay benefits, the Application for Arbitration should not be dismissed against Intact.

Intact's Position on Issue 1

Intact takes the same position as Mr. Cankaya on this issue and submits FSCO does not have jurisdiction to consider the exclusion clause set out in Section 1.8.4 of the OAP 1, and the answer to the first question is no. Intact relies on the same cases as Mr. Cankaya in support of its position.

Intact's Position on Issue 2

Intact takes the same position as Mr. Cankaya on this issue and submits that Unifund, as the first Insurer to receive the Application for Accident Benefits, is required to respond and adjust Mr. Cankaya's Application for Accident Benefits.

Intact cites the decision in *Andriano and Wawanesa Mutual Insurance Company*¹¹ as reaching the conclusion that the Insurer who was first to receive a completed application is legally required to adjust the claim, pending the outcome of any priority dispute.

Intact's Position on Issue 6

Intact relies on Section 2.1(4) of *O. Reg. 283/95* which states that an Applicant is only entitled to submit an Application for Accident Benefits to a single Insurer. It is inconsistent for Mr. Cankaya to submit that Unifund should adjust his claim but also pursue an Application for Arbitration against Intact for accident benefits. There is no legal justification or compelling reason to allow for it. Intact relies on the *Andriano*¹² decision.

The rationale that Intact could have accepted the claim and then commenced a priority dispute is not sufficient as to allow for Mr. Cankaya to maintain two separate Applications for Arbitrations to pursue accident benefits. Intact had no legal obligation to accept Mr. Cankaya's claim as he had applied to Unifund prior to Intact.

Intact submits it should not have to wait for Mr. Cankaya to withdraw his Application for Arbitration and the most efficient and expeditious means of resolving the dispute would be to dismiss the application against Intact, similar to *Andriano*.

Unifund's Position on Issue 1

Unifund relies on a number of different arguments in support of its submission that FSCO does have jurisdiction to consider and determine whether or not the exclusion set out in Section 1.8.4. of the Ontario Standard Auto Policy can relieve Unifund of its obligation to respond/adjust Mr. Cankaya's application for statutory accident benefits as provided by Section 2.1(6) of *O. Reg. 283/95 - Disputes Between Insures*.

¹¹ FSCO A06-000001, August 31, 2007.

¹² *Ibid.*, at para. 49.

First it relies on Practice Note 10, which states if the Insurer takes the position that an Applicant is not eligible for accident benefits, and then the dispute should proceed to Mediation. According to Unifund, this process also applies to claims where the Insurer takes the position that another Insurer has the responsibility to respond/adjust a claim for accident benefits.

Unifund also relies on the decision of *Mohamed and State Farm Mutual Automobile Insurance Company*¹³ which it submits stands for the proposition that the first Insurer is only obliged to pay benefits if the insured person has established entitlement to them.

Unifund submits that a determination of whether or not Mr. Cankaya is excluded as a “garage worker” in accordance with section 1.8.4 of the OAP 1 is not governed by O. Reg. 283/95 and thus falls within the jurisdiction of FSCO.

A number of cases were relied upon by Unifund to illustrate that FSCO Arbitrators routinely make a determination on whether Applicants are precluded from receiving accident benefits on the basis of a policy and/or statutory exclusion.

Unifund submits that the determination of whether the “garage worker” exclusion applies is not a coverage issue as dealt with in the cases relied upon by Mr. Cankaya and Intact in their submissions. In the *Bianca* and *Vieira* cases, both Insurers refused to accept the claims for accident benefits because neither Insurer insured the Applicants or their vehicles. In these cases, the Arbitrators held that the issue of whether the Applicants were “insured persons” under the policies was to be determined by way of private Arbitration pursuant to *O. Reg. 283/95*.

Unifund’s Position on Issue 2

On April 7, 2015, a Pre-Hearing took place before Arbitrator Davies, who ordered that the issue of whether Mr. Cankaya was precluded from coverage by operation of section 1.8.4 of the OAP 1 be

¹³ FSCO Appeal P99-00022, December 1, 1999.

determined by way of a Preliminary Issue Hearing. Mr. Cankaya appealed the Order. On Appeal, Director's Delegate Blackman held that Arbitrator Davies erred in law in setting a coverage issue between Unifund and Mr. Cankaya. The Director's Delegate ordered a Preliminary Issue Hearing be held on whether there was a nexus between Mr. Cankaya and Unifund. However, he made no reference to the applicability of the exclusions set out in section 1.8.4. of the OAP 1.

Unifund issued an Application to the Divisional Court for Judicial Review on November 16, 2015 of the Director's Delegate decision.

Based on the Appeal currently in progress, Unifund takes the position that if FSCO does not have jurisdiction to determine whether Mr. Cankaya is excluded from coverage, Unifund's obligation to respond and adjust Mr. Cankaya's claim for accident benefits is dependent upon the results of the Application for Judicial Review.

Unifund's Position on Issue 6

Unifund is taking no position on whether the proceedings against Intact should be dismissed.

Findings

Issue 1

After having reviewed *O. Reg. 283/95*, submissions, and decisions referred to by counsel, I find that FSCO does not have jurisdiction to consider and determine whether or not the exclusion set out in Section 1.8.4. of the OAP 1 can relieve Unifund of its obligation to respond/adjust the Applicant's application for statutory accident benefits as provided by Section 2.1 (6) of *O. Reg. 283/95 - Disputes Between Insurers*.

The facts before me are very similar to several of the decisions Mr. Cankaya and Intact referred to in their submissions. I am bound by *Vieira*, the Appeal decision made by Director's Delegate Draper. I also agree with this reasoning in that *O. Reg. 283/95* was put into place so an Applicant,

such as Mr. Cankaya, would not be caught between two Insurers, each claiming the other is responsible for paying her accident benefits, and have to wait years for someone to respond and adjust his claim for accident benefits. It is unreasonable for Mr. Cankaya to find himself waiting over two and a half years for his claim be responded to by one of two Insurers, both which he had valid policies of insurance with at the time of the incident. The arguments being put forth by Unifund in no way persuade me to find that the facts surrounding this matter do not fall clearly under *O. Reg. 283/95*. I agree with Mr. Cankaya's reply submissions in response to Unifund's arguments.

It is noted that Practice Note 10 states the following:

Where the first insurer believes it is the wrong insurer and also claims that the insured person is not entitled to benefits under the *Statutory Accident Benefits Schedule*, it must respond to the claim on two separate fronts – issuing the notice to the insurer it believes is responsible under s. 268, and following the procedures for denying a claim through the normal dispute resolution process at the Commission.

It is clear that Unifund has not done either of the above. I find that raising a Preliminary Issue on whether Mr. Cankaya has coverage under his policy is not in accordance with the Practice Note.

I also find that Unifund's submission that the issue of applicability of the garage workers exclusion clause is not governed by *O. Reg. 283/95* was made without any support and legal arguments. It seems this type of issue is squarely within an Arbitrator's jurisdiction under *O. Reg. 283/95*. It appears the situation and delay that Mr. Cankaya finds himself in at present are the very situations that *O. Reg. 283/95* was enacted to prevent from happening.

It was also noted by Mr. Cankaya in his reply submissions that none of the four decisions relied upon by Unifund, to support the argument that FSCO has jurisdiction to adjudicate the coverage issue in this case, were cases where the Insurer challenged its *prima facie* obligation for payment of benefits under the *SABS*. In all of these cases, the Insurer's argument was that the Applicant

was not eligible for a specified benefit. I agree this is a very important distinction and find these cases not instructive to this case.

I also agree with Mr. Cankaya that some of the other cases relied upon by Unifund were decided before the passage of the priority dispute regulation, *O. Reg. 283/95*, and thus not persuasive on the facts before me.

It is also my finding as noted above that Unifund has failed to show how Mr. Cankaya's situation falls outside of the *Vieira* Appeal decision.

Issue 2

Given my findings above in Issue 1, Unifund is obliged to respond and adjust Mr. Cankaya's application for statutory accident benefits. This finding is necessary so Mr. Cankaya may be treated fairly and receives benefits under the *SABS* to which he is entitled. As well it is consistent with the purpose and rationale of *O. Reg. 283/95*.

I have not been provided any authority on why Unifund should be allowed to further delay adjusting and responding to Mr. Cankaya's Application for Accident Benefits while the Appeal is dealt with by Divisional Court. I also note that Mr. Cankaya takes the position that Unifund's application to Divisional Court was premature as the Director's Delegate ruling was an interim ruling, and it may be struck out when it comes for a Hearing.

Issue 6

Out of abundance of caution and to ensure Mr. Cankaya does not suffer any further procedural delays or prejudice, I will not grant Intact's request to dismiss Mr. Cankaya's Application for Arbitration against it.

I find merit in Mr. Cankaya's submissions that at the time of the incident, he was properly insured with Intact, and he applied to them for benefits when Unifund refused his claim. Intact had the

opportunity at that time to respond and adjust his claim and then initiate a priority dispute with Unifund.

I also note that in the *Andriano* decision provided by Intact that no dismissal was granted but rather one Insurer was substituted for another by the Arbitrator once it was determined which Insurer was responsible to adjust the claim. In the case before me, I have two separate Applications for Arbitration. In the circumstances, I believe it is best to revisit this issue after it is determined, and after all Appeal periods have expired, which Insurer is responsible to pay Mr. Cankaya benefits. However until the final determination is made on which Insurer is responsible to pay benefits, the Application for Arbitration should not be dismissed against Intact.

EXPENSES:

The parties made no submissions on expenses. They are encouraged to resolve this issue together. If they are unable to do so, they may schedule an expense hearing in writing before me according to the provisions of Rules 75-79 of the *Dispute Resolution Practice Code*.

Marshall Schnapp
Arbitrator

September 26, 2016

Date



FSCO A14-009220

BETWEEN:

MURAT CANKAYA

Applicant

and

UNIFUND ASSURANCE COMPANY

Insurer

AND

FSCO A14-009222

BETWEEN:

MURAT CANKAYA

Applicant

and

INTACTI NSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and *Ontario Regulation 664*, as amended, it is ordered that:

1. FSCO does not have jurisdiction to consider and determine whether or not the exclusion set out in Section 1.8.4. of the Ontario Standard Auto Policy (OAP 1) can relieve Unifund of its obligation to respond/adjust the Applicant's application for statutory accident benefits as provided by Section 2.1 (6) of O. Reg. 283/95 - Disputes Between Insurers.

2. Unifund is obliged to respond/adjust the Applicant's application for statutory accident benefits.
3. The Application against Intact is not dismissed.

Marshall Schnapp
Arbitrator

September 26, 2016
Date