



FSCO A12-001507

BETWEEN:

RYAN BOWLER

Applicant

and

PAFCO INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Alec Fadel
Heard: August 19, 20, 21, 22, 2013, in Hamilton, Ontario.
Appearances: J. David Murphy for Mr. Bowler
Ryan M. Naimark for Pafco Insurance Company

Issues:

Ryan Bowler, the applicant, was injured in a motor vehicle accident on January 29, 2008. He applied for and received statutory accident benefits from Pafco Insurance Company (“Pafco”), payable under the *Schedule*.¹ A dispute arose concerning Mr. Bowler’s entitlement to two benefits. He claims he is entitled to the cost of an orthopaedic mattress as a result of ongoing back pain from injuries he sustained in the accident. He is also claiming the cost of retraining which includes tuition, rent, books and other university-related expenses. He claims he is entitled to the cost of retraining to be a teacher because he can no longer fulfill his goal of becoming a police officer as a result of the injuries he sustained in the accident.

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

Pafco takes the position that a treatment plan was not provided for either of the claimed benefits before the expenses were incurred and therefore the items are not payable pursuant to subsection 38(1.1) of the *Schedule*. It also submits that neither of the subsequently received treatment plans was signed by the applicant and, pursuant to subsection 38(2), are not payable. In the alternative, the insurer argues that neither of the claimed benefits is reasonable or necessary.

Mr. Bowler suggests that I should overlook the procedural requirements in the *Schedule* since he substantially fulfilled most of what was required of him. He informed the insurer of the expense, he ultimately did submit a treatment plan (though in each instance after incurring the expense). He also claims that he was not represented by legal counsel in relation to his accident benefit claims at the time and should not be penalized for incurring the expense before submitting a treatment plan. In the alternative, he asks that I remedy the delivery of the treatment plan after the expense was incurred by relying on either section 31 of the *Schedule*, failure to comply with time limits, or section 129 of the *Insurance Act*, relief from forfeiture.

The parties were unable to resolve their disputes through mediation, and Mr. Bowler 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 hearing are:

1. Is Mr. Bowler entitled to the cost of a mattress in the amount of \$1,389.84?
2. Is Mr. Bowler entitled to \$22,437.19 for retraining expenses?
3. Is Pafco liable to pay a special award?
4. Is Mr. Bowler entitled to interest for overdue payments?
5. Is either party entitled to their arbitration expenses?

Result:

1. Mr. Bowler is not entitled to the claimed cost of a mattress.
2. Mr. Bowler is not entitled to the claimed retraining expenses.
3. Pafco is not liable to pay a special award.
4. There is no order on the issue of expenses. I remain seized should the parties be unable to resolve this issue on their own.

EVIDENCE AND ANALYSIS:

I find that Mr. Bowler is not entitled to either the mattress or the retraining expense because he did not comply with the requirements of subsection 38(1.1) of the *Schedule*. This subsection reads:

An insurer is not liable to pay any expense in respect of medical benefits or rehabilitation benefits that was incurred before the insured person submits an application for the benefit that satisfies the requirements of subsection (2) unless the expense is for an ambulance or other goods or services provided on an emergency basis not more than five business days after the accident to which the application relates.

This section was amended on March 1, 2006, and prior to that date read as follows:

An insured person shall submit an application for a medical or rehabilitation benefit to the insurer before incurring any expense in respect of the benefit or an assessment or examination to which this section applies.

The legislative change clarifies that if an insured person submits an application before incurring the expense, “[a]n insurer is not liable to pay.”

Failure to Comply with Time Limits

The applicant points to section 31 of the *Schedule* suggesting that I may remedy the late delivery of the treatment plans if the applicant provides a reasonable explanation. Section 31(1) states:

A person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation.

As pointed out by the insurer, the caselaw provided by the applicant deals with the time limit for applying for accident benefits. I agree with the insurer and find that this section is not relevant in this instance given that the issue before me deals with section 38(1.1). The issue in this case concerns a time limit, but deals specifically with the order of doing things. In this case the insurer is not liable if an expense is incurred before the treatment plan is submitted.

Relief from Forfeiture

The applicant also argues that section 129 of the *Insurance Act* assists in granting relief to the applicant's failure to provide a treatment plan prior to the expense being incurred. Section 129 of the *Insurance Act* states:

Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

The applicant presented no case law to suggest that this section is relevant to my consideration. The insurer referred to the Court of Appeal decision in *Williams v. York Fire & Casualty Insurance Company*⁴ where it was stated that,

⁴ 86 O.R. (3d) 241

Section 109 [now s. 129] gives the court power to relieve from such forfeiture or avoidance. But it is only in respect of such statutory conditions as to proof of loss or other matters or things that are required to be done or omitted with respect to the loss that the court has this power.

Further in paragraph 31 of *Williams* the Court stated:

[31] Section 129 does not give judges a broad discretion to "grant relief from forfeiture" generally where the conditions of an insurance policy are breached. To do so would grant the court power to alter the terms of a policy or conditions of coverage; this power was never envisioned by s. 129.

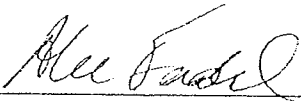
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[33] The court's power under s. 129 is only in relation to things or matters required to be done, in relation to the loss, that is, after a loss has occurred. The discretion a court has under s. 129 is a narrow one pertaining only to those policy conditions -- statutory or contractual -- that relate to proof of loss. It does not apply generally to all policy conditions.

Accordingly, I find that section 129 of the *Insurance Act* is not relevant in this case.

EXPENSES:

The parties did not speak to the issue of expenses and I remain seized should they be unable to determine this issue on their own.



Alec Fadel
Arbitrator

December 3, 2013

Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



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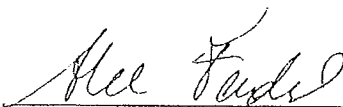
PAFCO INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Mr. Bowler is not entitled to the claimed cost of a mattress.
2. Mr. Bowler is not entitled to the claimed retraining expenses.
3. Pafco is not liable to pay a special award.
4. There is no order on the issue of expenses. I remain seized should the parties be unable to resolve this issue on their own.



Alec Fadel
Arbitrator

December 3, 2013

Date