Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A07-002264

BETWEEN:

DIANE MASSA

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Alec Fadel

Heard: April 9, 2009, at the offices of the Financial Services Commission of Ontario in Toronto and on April 16, 2009 by teleconference.

Appearances: David Schell for Ms. Massa
Paul Kiddey for Allstate Insurance Company of Canada

Issues:

The Applicant, Diane Massa, was injured in a motor vehicle accident on August 18, 2006. She applied for and received statutory accident benefits from Allstate Insurance Company of Canada ("Allstate"), payable under the *Schedule*.[1] Allstate paid an income replacement benefit at the rate of $288.26 until it was terminated on December 15, 2006. Ms. Massa applied for mediation and ultimately arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. She seeks, amongst other benefits, entitlement to an income replacement benefit until the 104-week mark, August 18, 2008, less amounts already paid by Allstate.

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

At the pre-hearing conference of February 25, 2008, Allstate raised the issue of deductibility of long-term disability benefits (LTDs) potentially available to Ms. Massa through a policy with Great-West Life (GWL) and made available to her as an employee of Black's Photography (Black's) pursuant to section 7(1)1(ii) of the *Schedule*.

For the purpose of the preliminary issue hearing, the parties did not address whether or not Ms. Massa would meet the test for entitlement to the LTDs with GWL. Ms. Massa took the position that she would meet the eligibility requirements for the LTD benefits with the caveat that there was no guarantee that GWL would have approved the application if the benefits were available.

The preliminary issue is:

1. Were the long-term benefits under a Great-West Life plan available to Ms. Massa as a result of any injuries or disabilites arising from the August 18, 2006 motor vehicle accident, and if so, are they deductible from the past income replacement benefits, if found owing, under section 7(1)1(ii) of the *Schedule*?

Result:

1. The long-term disability benefits under the Great-West Life plan were not available to Ms. Massa and therefore Allstate is not entitled to deduct said benefit from any income replacement benefit found owing under section 7(1)1(ii) of the *Schedule*.

THE LAW

Section 7(1)1 of the *Schedule* states:

> **7.** (1) Despite subsections 6 (1) and (5), but subject to subsection 6 (2), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:
>
> 1. The amount determined under subsections 6 (1) and (5), reduced by,

i. net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and

ii. net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income. (emphasis added)

Section 2(9) of the *Schedule* states:

(9) For the purpose of this Regulation, payments for loss of income under an income continuation benefit plan shall be deemed to include the following payments:

1. Payments of disability pension benefits under the *Canada Pension Plan*.

2. Periodic payments of insurance, if the insurance,

i. is offered by the insurer only to persons who are employed at the time the contract for the insurance is entered into, and

ii. is offered by the insurer only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment. O. Reg. 482/01, s. 1.

(10) Subsection (9) only applies in respect of accidents that occur on or after January 1, 2002. O. Reg. 482/01, s. 1.

EVIDENCE AND ANALYSIS:

Background

As a result of the motor vehicle accident of August 18, 2006, Ms. Massa was unable to return to her employment and received an income replacement benefit from Allstate. At the time of the accident, Ms. Massa was employed as a lab technician for Black's where she had worked since September 19, 2001. An employer's confirmation of income form (OCF-2) completed by Ms. Rutter, a payroll representative from Black's, indicated that Ms. Massa was not eligible to receive an income continuation benefit (short-term or long-term disability plan) and Allstate

proceeded to pay the IRB on that basis. It was at the pre-hearing of February 25, 2008 when Allstate informed Ms. Massa that it had discovered that in fact there was an income continuation benefit available to her as an employee of Black's. The income continuation benefit provided entitlement to a long-term disability benefit with GWL and was a policy fully funded by Black's. Subsequent to the pre-hearing, Allstate indicated that it sent numerous letters to Ms. Massa stressing the importance of applying for the LTD. At the preliminary issue hearing, it was confirmed that Ms. Massa had not applied for the LTD benefit from GWL.

The Insurer referred to a form entitled "Black Photo Corporation Employee Benefits Profile"[2] which is a computer printout showing Ms. Massa's start date and the various benefits for which she was eligible. One of the entries on the form lists a "group dental care plan" and another a "heath care plan" with an indication that Ms. Massa became eligible for each on January 1, 2002 and that certain deductions would also commence on that date with regard to the "health care plan". The last entry on the form identifies the "long term disability income protection" noting that Ms. Massa would become enrolled in this plan on October 1, 2003 and that Black's would pay 100% of the cost. A further form[3] shows that Ms. Massa, on February 21, 2002, signed a spousal exemption, indicating that she did not wish to participate under the "medical" and "dental" plans with Black's and confirming that she was insured under her spouse's plan.

A representative from GWL, Ms. Madalina Boffa-Salmon, who has worked for the company as a team manager for 11.5 years, gave evidence at the preliminary issue hearing. Ms. Boffa-Salmon testified that it was her staff that oversaw the Black's policy and while she did not personally handle the file, it was handled by one or more of the claims managers that worked on her staff. She confirmed that there was a GWL policy with Black's at the relevant time and that it had been in place since May 1, 2000. She explained that by the choice of Black's this was a "self-accounting" policy, meaning that the employer kept the records, and therefore GWL could not confirm that Ms. Massa was actually covered under their plan at the time of the motor vehicle accident. In her evidence, Ms. Boffa-Salmon indicated that in order to make an application for LTD benefits, three forms, available from the employer, were to be completed and submitted to

[2] Exhibit 1, Tab 6, page 72
[3] Exhibit 1, Tab 7, page 74

GWL. Though GWL did not have a file pertaining to Ms. Massa, Ms. Boffa-Salmon stated that if Ms. Massa was covered under the policy, she would be able to apply for the LTD at the end of the 180 day waiting period, being February 14, 2007. She noted that based on the policy, if the initial application was denied, there was a further 31 days before the insurance would terminate. The policy also stated that GWL would not be liable for LTDs, six months after the end of the waiting period or six months from the date the policy terminated. Ms. Boffa-Salmon noted that GWL allowed late claims in certain circumstances, but when asked specifically what GWL would do at this time if it received a claim from Ms. Massa with information regarding one of the exclusions, she stated that, without an explanation, the application would be refused.

Ms. Tina Grouios, a representative from Black's, also gave evidence. Ms. Grouios has worked for Black's for 20 years and has been the director of human resources for the last 15 years. She explained that in the normal course when first hiring an employee, it is the manager of the specific store that would go over the benefits available to the employee when explaining the remuneration package. She explained that the form "Black Photo Corporation Employee Benefits Profile" was sent to all employees in order to explain the benefits and when they became available. Ms. Grouios could not recall if, at the time Ms. Massa was hired, the company used a paper-based system to explain benefits or if they were available on the intranet as they are today. She spoke to the computer-based system where each employee has a number and I.D. allowing them access and, once into the system, the employee would follow certain links to obtain information pertaining to the benefits. Ms. Grouios confirmed that Ms. Massa had been enrolled in the LTD program since October 1, 2003. Ms. Grouios confirmed that the LTD benefit was 100% employer funded and was unaware if the employer would send confirmation to the employee once they became enrolled.

Ms. Grouios offered two explanations regarding the employer's incorrect completion of the OCF-2. She indicated that it was either filled out in error or it was filled out with a different interpretation given that at the time there were no LTD benefits available to Ms. Massa until six months after the disability arose, based on the policy with GWL. Ms. Grouios noted Black's policy to accommodate its injured employees, noting a regular practice to get the employee back

to work. A letter dated November 7, 2006,[4] from Ms. Gavin, human resources manager, to Ms. Massa requested permission for Black's to speak with her physician to discuss a return to work with accommodations, and a letter dated December 8, 2006[5] to Dr. Rodrigues noted Black's intention to work on a return to work plan. Ms. Grouios also referred to Ms. Gavin's log notes[6] which indicated that on November 3, 2006 they had an incorrect phone number for Ms. Massa. On November 7, 2006 the log note indicated that Ms. Gavin successfully contacted Ms. Massa on her cell phone and was given a new phone number and address along with permission to speak with her family physician. A note dated January 9, 2007, refers to a discussion between Ms. Gavin and Dr. Rodrigues and sets out Ms. Massa's condition and limitations. Ms. Grouios referred to two attempts to contact Ms. Massa after speaking with her doctor, noting that both times she left voice mail messages and the messages were not returned. Ms. Grouios stated that as a regular course, if there was an indication that the employee would be away for longer than six months, Black's would initiate paperwork for the LTD application, four to five months after the disability and this included sending the employee the requisite forms to complete. Ms. Grouios noted that in the case of Ms. Massa, there was no evidence that an LTD package had been sent. In the opinion of Ms. Grouios, the benefits were available to Ms. Massa.

Ms. Massa also gave evidence at the preliminary issue hearing. She stated that she recalled being given pamphlets concerning the benefits available to her at the beginning of her employment, but always had in her mind that she did not want benefits through Black's because she was covered under a plan through her spouse's employer. She recalled the form "Black Photo Corporation Employee Benefits Profile" but could not recall reading the information regarding the LTD benefit contained at the bottom of that document. Ms. Massa testified that she did not use the computer that was in the store as this was not a part of her job and she was not provided with an I.D. in order to do so. She noted that she filled out a spousal exemption because she was told that she was eligible for the benefits and that she had to complete the form if she did not want them. Ms. Massa had no recollection of the employer telling her at the time that the exemption she was signing did not apply to the LTD benefit or that it was 100% employer funded. Ms. Massa noted that she had changed her cell number many times during the

[4] Exhibit 1, Tab 8, page 81
[5] Exhibit 1, Tab 8, page 75
[6] Exhibit 1, Tab 8, pages 87-89

relevant period and explained that it may be the reason why she did not receive the phone messages from Black's. Ms. Massa noted, however, that when she spoke to Ms. Gavin and authorized her to speak to her family doctor, there was no indication that the employer was seeking to accommodate a return to work and no mention of LTD benefits. It was the evidence of Ms. Massa that had she known LTD benefits were available to her she would have applied for them at the relevant time. Ms. Massa also confirmed that her spouse was no longer unionized and she did not have access to collateral benefits through her husband's employment.

Insurer's Submissions

Allstate stated that it was not relevant whether or not the Applicant had knowledge of the LTD policy noting that there was no "reasonable excuse" provision in section 7 of the *Schedule*. It further stated that despite the Applicant's evidence, she ought to have known there were LTD benefits available to her through her employer. Allstate referred to the fact that Ms. Massa was represented by counsel and that the issue of the LTD dominated the pre-hearing followed by eight letters from the Insurer describing the importance of applying for same. Allstate referred to a number of cases to support its position including *Baillargeon v. Murray,*[7] where it was held that in order to require a deduction for past loss of income the insurer had to prove that the benefits "were or are available" to the applicant on a balance of probabilities and submitted that whether the applicant "knew or ought to have known" was not a consideration. Allstate also referred to the Supreme Court of Canada decision, *Madill v. Chu,*[8] which supports the proposition that an applicant's failure to apply for collateral benefits does not preclude the deductibility of the benefits. The Insurer also referred to *Orchover et al. v. Wright et al.,*[9] to support the proposition that an applicant cannot by their own act deprive the insurer of the deduction and that when the Legislature enacts legislation that allows the insurer to benefit from the availability of other insurance, the applicant's unilateral and independent behaviour should not be visited on the insurer.

[7] [2001] O.J. No. 1487
[8] [1977] 2 S.C.R. 400
[9] [1996] O.J. No. 5387 (Ont. Gen. Div.)

Applicant's Submissions

The Applicant argued that the OCF-2 played a large role in her state of mind. The Applicant pointed to other actions by Black's that prevented the possibility of an application for the LTD being made including the fact that no LTD benefits package was sent and Black's failure to send actual correspondence with specific information concerning either their discussion with Dr. Rodrigues or the availability of LTD benefits. The Applicant referred to *Chrappa v. Ohm*, where Justice Goudge, writing for the Court of Appeal, found that "the jurisprudence supports the view that where the concept of entitlement to future long-term insurance benefits is used as a basis for reducing the plaintiff's damage recovery it must be strictly interpreted to require that it be beyond dispute that the plaintiff qualifies for these future payments in every respect."[10] The Applicant reiterated that she was barred at this point from making an application to GWL for the LTD and noted that section 7 of the *Schedule* was meant to prevent double recovery which was no longer possible, in any event. The Applicant argued that part of the test to show that the LTD was "available" necessarily involves her knowledge that it is available. The Applicant stated that *Baillargeon* could be distinguished since Ms. Massa was unaware of the existence of the LTDs until recently, whereas in *Baillargeon* the plaintiff was aware of the benefits to which he was entitled. The Applicant stated that effective August 13, 2007, she was no longer eligible to claim benefits from GWL since this was six months after the 180 day waiting period or the actual date of termination and therefore her actions after the pre-hearing were not relevant.

Legislative Purpose

Many of the cases referred to at the preliminary issue hearing speak to the legislative purpose of section 7(1) of the *Schedule*. In *Bhola and Personal Insurance Company of Canada*, the arbitrator summarized the conclusions made by Director's Delegate Draper in *Wilcox and Economical Mutual Insurance Company*[11] as follows:

[10] (1998) CanLII 893 (Ont. C.A.) at page 7
[11] (FSCO P99-00015, March 2, 2000)

1. The purpose of the deductibility provisions is to prevent double recovery. While injured persons should not be penalized by having access to other benefits, they should not be compensated twice for the same loss.

2. Where non-deductibility of a type of benefit has been established, it would take the clearest legislative language to displace it.[12]

Director's Delegate Makepeace in *Allstate Insurance Company of Canada and Da Rosa* examined the collateral benefits section of an earlier version of the *Schedule*[13] and stated that "the collateral benefits rules in the SABS are intended to achieve the same legislative purposes as the deduction from damages rules in the *Insurance Act* – to prevent double recovery, give effect to rules about priority of payers, ensure appropriate relief for accident victims, and minimize litigation."[14]

FINDINGS

Ms. Massa gave her evidence in a clear and straightforward manner and I found her to be a credible witness. She was adamant in her belief that there was no LTD benefit available to her even after hearing that there may be a policy in place at the pre-hearing. I believe the Applicant when she stated that by signing the spousal exemption, she thought she was signing away any benefits available to her through her employer and that this was the foundation of her belief that the benefit was not available to her. I note the "Black Photo Corporation Employee Benefits Profile" form names the relevant benefits available as "Group Dental Care Plan," "The Health Care Plan" and "Long Term Disability Income Protection" compared with the spousal exemption form that lists the two benefits being waived as "medical" and "dental". The two forms when compared do not clearly show what benefits were being waived on the spousal exemption form relative to the listed benefits on the "Black Photo Corporation Employee Benefits Profile".

[12] *Bhola and Personal*, (FSCO A06-001473, September 17, 2007) at page 7
[13] *The Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996, Ontario Regulation. 776/93, as amended*
[14] (FSCO P04-00033, May 25, 2006) variation, at page 12

In my review of the employment file, including the noted attempts to accommodate Ms. Massa with a return to work, the log notes concerning the discussion with the family doctor and the attempts to contact Ms. Massa, I note that there is no mention of a possible LTD application and no attempt to send the requisite forms to Ms. Massa. Even after speaking with Dr. Rodrigues in January 2007, more than four months after the motor vehicle accident and less than two months before an application could be made for LTDs from GWL, it does not appear that Black's put its mind to the possibility that Ms. Massa may be eligible to apply for the LTD benefit through GWL. I therefore find that at no time during the relevant period, being from the date of loss to the date of termination of the GWL policy, did Black's inform either Ms. Massa or Allstate that, despite the OCF-2, there were in fact collateral benefits available.

The parties presented a number of cases that dealt with the issue of deduction of future collateral benefits and its effect on settlement with an accident benefit insurer. These cases were not particularly helpful to my analysis given that the question before me deals with past entitlement to the LTD benefit. Also, the case law dealing with the question of past benefits involved fact situations where the applicant/plaintiff was aware of the coverage but chose to either settle or not apply for the available benefit. Essentially, the cases found that past benefits are deductible if they were available and if they have not been refused. The case law relied upon by the parties did not deal with the question of whether actual knowledge of a benefit was a necessary component to finding whether or not a collateral benefit is available and therefore deductible under section 7 of the *Schedule*. In Ms. Massa's situation, the question is even more specific, being: Is the LTD benefit "available" when the applicant has no knowledge of it and when this is confirmed by an OCF-2 completed by the actual employer?

An application for accident benefits form (OCF-1) requires the applicant to provide details of any collateral insurance; the employer is also asked about collateral insurance on the OCF-2. In the normal course, in an instance where an insurer receives an OCF-1 and OCF-2 with conflicting information, it is permitted to follow-up and clarify the information. Therefore, in most cases where an applicant is unaware of collateral insurance through their employment, they would find out early in the application process that it actually exists, provided the employer correctly completes the OCF-2. I find that it is the employer who has the most accurate

information on collateral benefit coverage through employment, especially in the case where the collateral policy is set up as a "self-accounting" policy making the employer responsible for the record keeping. In the case before me, the Applicant had the mistaken belief that she was not entitled to collateral benefits and since this was supported by the information coming from the employer on the OCF-2, this belief continued beyond the time the Applicant could actually apply for the LTD. Based on these facts, I find that the LTD benefits with GWL were not "available" to the Applicant.

In my view it is a stretch to say that benefits were available to Ms. Massa when she believed she had no coverage and when the actions of the employer support that they were not available. I find that it is a necessary condition that the applicant actually have knowledge that there was collateral coverage in place during the relevant time so that an application could be made. There is no reason why Ms. Massa is not entitled to rely on the information provided by the employer which confirmed her belief that there was no collateral insurance coverage. I also note that in its submissions, the Insurer did not address the relevance of the OCF-2 being completed incorrectly and the effect of same on the meaning of section 7 of the *Schedule* when combined with the Applicant's belief that there were no benefits available. After the fact, evidence has been provided to show that, at the relevant time, an application for LTD could have been made to GWL. I believe the Applicant when she testified that had she known she would have applied for the collateral benefit at the relevant time

A review of section 7(1)1(ii) of the *Schedule* suggests that there is no subjective consideration for my review. However, in this particular situation, it is important to ask whether a reasonable person would have been aware that there was collateral insurance in place. I find that an income continuation plan cannot be found to be available under section 7 of the *Schedule* if the applicant has no knowledge of its existence combined with an employer's reporting on an OCF-2 that there is no coverage (unless that error is discovered by the employer and reported to the accident benefit insurer or its employee prior to the time that the relevant collateral policy terminates).

While one of the purposes of section 7 of the *Schedule* is to prevent double recovery, another is to allow the deduction of valid collateral insurance in favour of the accident benefit insurer.

In this instance, since Ms. Massa is no longer entitled to apply for LTDs and, given the testimony of the GWL representative that an application made today would be refused without an explanation, I find that there is no longer any availability to LTD benefits through the GWL policy and therefore no chance of double recovery.

EXPENSES:

The parties made no submission on expenses incurred in this preliminary issue hearing. I note that there was nothing unusual about the hearing that would assist in determining this issue. I therefore reserve the issue of expenses to the hearing Arbitrator. If this matter should settle prior to a hearing and the parties are not able to resolve the issue of expenses of this preliminary issue hearing, either party may make an appointment for me to determine the issue in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code.*

May 26, 2009

Alec Fadel
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A07-002264

BETWEEN:

DIANE MASSA

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

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

1. The long-term disability benefits under the Great-West Life plan were not available to Ms. Massa and therefore Allstate is not entitled to deduct said benefit from any income replacement benefit found owing under section 7(1)(ii) of the *Schedule*.

May 26, 2009

Alec Fadel
Arbitrator

Date