COURT OF APPEAL FOR ONTARIO

CITATION: Allstate Insurance Company of Canada v. Klimitz, 2015 ONCA 698
DATE: 20151019
DOCKET: C60323

Feldman, Juriansz and Brown JJ.A.

BETWEEN

Allstate Insurance Company of Canada

Appellant

and

Edna Klimitz and the Financial Services Commission of Ontario

Respondents

Todd J. McCarthy and Candace Mak, for the appellant

Jillian Van Allen, for the respondent Edna Klimitz

No one appearing for the respondent the Financial Services Commission of Ontario

Heard: September 29, 2015

On appeal from the judgment of the Divisional Court (Associate Chief Justice Frank N. Marrocco and Justices James M. Spence and Carolyn J. Horkins), dated December 12, 2014, with reasons reported at 2014 ONSC 7108, dismissing an application for judicial review of a decision of the Financial Services Commission of Ontario, dated March 21, 2013.

ENDORSEMENT

[1] The appellant, Allstate Insurance Company of Canada, appeals from the judgment of the Divisional Court dismissing its application for judicial review of

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the decision of the Director's Delegate, Lawrence Blackman, dated March 21, 2013. The Director's Delegate had allowed the appeal of the respondent, Edna Klimitz, from the April 13, 2012 order of an Arbitrator at the Financial Services Commission of Ontario. The Arbitrator found that the respondent was precluded from proceeding to arbitration because she had filed her application for mediation more than two years after the appellant's refusal to pay her a non-earner benefit, contrary to the requirements of s. 281.1(1) of the *Insurance Act*, R.S.O. 1990, c. I.8.

[2] In its May 31, 2004 OCF-9, Explanation of Benefits Payable by Insurance Company, the appellant provided the respondent with its reasons for denying her application for non-earner benefits under the *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996*, O. Reg. 403/96 (the "Regulation"). In its reasons, the appellant expressly relied on evaluations of the respondent made by two physicians, one of whom was Dr. Garry Moddel. The appellant stated in its OCF-9:

> A recent insurer's neurological evaluation and a previous insurer's orthopaedic evaluation have determined that you do not suffer from a complete inability to carry on a normal life due to any impairment susta[i]ned in the accident of November 7, 2003. Therefore, you do not qualify for a Non-Earner Benefit.

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[3] The appellant sent the OCF-9 to respondent's counsel under the cover of a letter dated May 31, 2004. Although that letter purported to enclose Dr. Moddel's evaluation, there is no dispute that the evaluation in fact was not included with the letter and OCF-9.

[4] We agree, for the reasons given by the Divisional Court, that it was not unreasonable for the Director's Delegate to conclude, in the circumstances of this case, that the two year limitation period did not start to run until the respondent had received a copy of Dr. Moddel's report in satisfaction of Allstate's obligation to give reasons for its determination under s. 37(1) of the Regulation, as it then read (now incorporated, in part, in s. 35(9)).[1] The Director's Delegate was entitled to deference in the interpretation of his home statute. We are not persuaded the decision was inconsistent with this court's decision in *Turner v. State Farm Mutual Automobile Insurance Co.*, 26 Admin. L.R. (4th) 275 or *Sietzema v. Economical Mutual Insurance Company*, 2014 ONCA 111, 118 OR (3d) 713.

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[1] At the time of the respondent's accident, s. 37(1) of the Regulation read:

> 37. (1) If the insurer determines that a person is not entitled or is no longer entitled to receive an income replacement, non-earner or caregiver benefit, the insurer shall give the person notice of its determination, with reasons,
> (a) within 14 days after receiving an application for the benefit; or
> (b) if the insurer has been paying the benefit to the person, no later than the date the next payment of the benefit is due.

Currently, s. 35(9) of the Regulation reads as follows:

> 35. (9) The insurer shall set out in its determination the specified benefits and expenses the insurer agrees to pay, the specified benefits and expenses the insurer refuses to pay and the reasons for the insurer's decision.

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[5] The respondent is entitled to her costs of the appeal in the amount of $3,500, inclusive of disbursements and HST.

"K. Feldman J.A."

"R.G. Juriansz J.A."

"David Brown J.A."

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