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# Defender

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## *Stranges v. Allstate* And Beyond: The Merits Of A Case Still Count

No one likes the game of “gotcha” when claimant’s counsel argues that procedural irregularities trump the substantial merits of a claim. In the world of accident benefits, unfortunately, too often we are looking as to whether the “i”s were dotted and the “t”s crossed as opposed to whether a claimant is actually injured and requires certain benefits. Often the claimant’s arguments for entitlement to benefits are based on certain technical non-compliance issues with the *Schedule*; as opposed to what the medical assessors have to say. The Court of Appeal decision of *Stranges v. Allstate* (2010) [leave to appeal to the Supreme Court of Canada denied] and subsequent decisions that follow, stand for the proposition that the merits of a case still take precedence over procedural irregularities.

### *Stranges v. Allstate* (2010) Court of Appeal

In *Stranges* it was found by the lower court that the insurer had provided an improper notice of termination of income replacement benefits. On account of this procedural error, the Court ordered benefits to be paid retroactively and continuously until such time as a proper notice was provided. At the same time the Court also found that the claimant did not continue to suffer a substantial inability to perform the essential tasks of her employment as she had recovered from all of her injuries. Accordingly, the Court found that despite the fact that the claimant did not meet the test for disability on substantive reasons, that she was still entitled to income replacement benefits due to procedural ones. Technical

over substantive.

The Court of Appeal disagreed. On Appeal the Court found that the inadequate notice did not automatically entitle the insured to payment of benefits. The Court of Appeal relied on the Supreme Court of Canada decision of *Smith v. Co-Operators* (2002) which found as follows:

[T]here was no proper refusal made and the limitation period did not begin to run. The appellant is not barred from bringing her action. However, I make no conclusion about the merits of her claim which a trial judge must assess, [emphasis added]

Accordingly, the Court of Appeal found that despite the procedural non-compliance by the insurer, the claimant was still required to prove her claim. Furthermore, since the trial judge had concluded that the claimant did not pass the substantial inability test, it was also found that entitlement to income replacement benefits had come to an end. Despite the procedural non-compliance issue, the claimant was not entitled to further benefits on account of substantive reasons.

This is presently the leading case that insurers ought to be cognizant of when dealing with files that have procedural problems. While as the Court of Appeal is not suggesting that non-compliance issues are to be tolerated, it does send a strong signal that decisions should be primarily based on the merits of the case. The case law



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Your comments are appreciated and if there are any commercial or insurance related topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article. Contact: [defender@beardwinter.com](mailto:defender@beardwinter.com)

that followed *Stranges* has for the most part followed the Court of Appeal's reasoning.

## Yogesvaran v. State Farm (2010) The Exception To Stranges

Despite the general acceptance of *Stranges* as the proper law regarding the importance of substance over procedure, The Director's Delegate decision of *Yogesvaran v. State Farm* (2010) seems to have come to an alternative conclusion. The decision of the Arbitrator at first instance occurred before the *Stranges* decision was released. By way of a preliminary issue hearing, the Arbitrator found that the insurer had failed to obtain an "up-to-date" disability certificate before having the claimant assessed by way of an insurer examination. The Arbitrator ruled that this was in violation of Section 37 of the *Schedule* and thereby found that benefits were never properly terminated. The Arbitrator found that since benefits have not been properly terminated that the payment of benefits were to be resumed; without regard to whether the claimant was entitled to same from a medical standpoint.

Upon appeal the Director's Delegate had the benefit of reviewing the *Stranges* decision. He found that he is bound by the decision of the Court of Appeal and that the Arbitrator of first instance was wrong. However, that was not the end of it. He argued that the failure to request a disability certificate is not insignificant and that consumer protection goals are the heart of the *Schedule*. He reasoned that an insurer should not gain an advantage by their misconduct by putting the insured to the proof of entitlement to a benefit the insurer had no right to stop paying. He found that an Arbitrator exercising his or her discretion to make an interim award of benefits, subject to a final determination of entitlement, would be consistent with *Stranges*. As such, the claimant was found entitled to income replacement benefits based solely on the procedural breach on an interim basis until the matter could be decided on a final basis at the Arbitration. The Director's Delegate did not include any provision that if the claimant were to lose on the merits of the case that he was obligated to repay to the insurer the interim benefits paid.

## Subsequent Case Law: The Acceptance Of Stranges

The Decision of *Yogesvaran* was shortly thereafter considered at FSCO in the decision on a motion for interim benefits in *Shanmuganathan v. State Farm* (2011). In that case, the Arbitrator rejected the rationale articulated by the Director's Delegate in *Yogesvaran* despite the fact that the circumstances were very similar. In *Shanmuganathan* it was agreed that the insurer was

in non-compliance with Section 37 by not specifically requesting a new disability certificate from the claimant; even though it already possessed approximately seven contemporary disability certificates. The claimant sought payment of interim benefits pending a final decision on the merits.

The Arbitrator found that it is extraordinary to grant monetary relief to a party prior to a full hearing. He found that the claimant provided no evidence of need or urgency for receipt of the interim benefits and that there was contradictory medical evidence to question the entitlement to same. The Arbitrator cited the decision of *Stranges* and *Bisnath* (see below) for the proposition that a hearing on the merits ought to proceed to determine the claimant's entitlement to benefits; and that there should not be a payment of interim benefits until that time.

In *Bisnath v. State Farm* (2011) the Arbitrator concluded that the insurer had failed to comply with the Section 37 requirements of the *Schedule* before terminating income replacement benefits. Despite this, the Arbitrator concluded that this failure did not, in itself, entitle the applicant to ongoing benefits before a hearing on the merits of her entitlement to income replacement benefits. Citing the *Stranges* case, the Director's Delegate and then the Divisional Court, upheld the ruling by the Arbitrator.

In *Stewart v. State Farm* (2012) the claimant brought a summary judgment motion in which he argued that he ought to meet the definition of a catastrophic impairment on the basis that the insurer had not made the request for a psychiatric assessment within the strict provisions of the *Schedule*. The judge relied on the analysis of *Stranges* and found that inadequate notice to Ms. Stewart of a psychiatric assessment does not automatically entitle her to the payment of benefits on the basis of catastrophic impairment. The Plaintiff is still required to prove her claim.

In *Klimitz v. Allstate* (2012) FSCO the claimant applied for mediation for entitlement to non-earner benefits more than two years after the denial. It was found that although the OCF-9 denying entitlement to such benefits was clear, unequivocal, and adequately explained the claimant's right to dispute the refusal; that there were procedural problems. Firstly, it was found that the insurer did not attach a copy of the insurer examination upon which it based its refusal to pay NEBs. Second, it was found that the insurer was in non-compliance with Section 37 as it had not complied with the time lines with respect to providing notice of the refusal. It was argued that since the notice was not provided in time that the claimant was deemed to be found entitled to NEBs during the intervening period.

The Arbitrator found that despite these procedural non-compliance



issues, that the claimant had missed the limitation period to proceed with the claim. The Arbitrator found that the failure to provide the insurer examination report should not relieve the claimant of her obligation to comply with the two year limit to apply for mediation. The failure to provide the report does not detract from the clarity and certainty of its refusal. To find otherwise would amount to holding the insurer to a standard of perfection which is contrary to the jurisprudence. Similarly, the Arbitrator found that a procedural failure on the insurer's part should not result in a deemed entitlement to NEB without requiring her to prove her claim on the merits. Citing the *Stranges* decision the Arbitrator found that "an inadequacy of a refusal notice does not entitle an insured person to payment of benefits".

## Conclusion

The Court of Appeal decision of *Stranges*, and the majority of the precedence that followed thereafter, stand for the proposition that a case should be determined on its merits and not on account of procedural non-compliance issues. The Director's Delegate decision of *Yogeswaran* suggests that a procedural non-compliance issue may be sufficient to warrant payment of non-refundable interim benefits pending a final decision on the merits. An award of interim benefits could turn out to be very significant as it will likely result in a payment of benefits and PJI from the date of the stoppage until the date that the Arbitrator releases his or her ruling following an Arbitration. This could easily amount to a period of two – four years; plus PJI. Yet, as set out in the *Shanmuganathan* decision, even Arbitrators at FSCO are at odds as to whether *Yogeswaran* is good law.

The lessons to be learned from the *Stranges* decision is that a procedural non-compliance issue does not automatically entail a claimant to benefits without consideration of the merits of the case. What has not been discussed in any great length is to what extent does the procedural irregularity make a difference. In all the cases set-out above the non-compliance issue had little bearing to the substance of the case. If the procedural non-compliance issue were to be substantive and truly infringed on the claimant's rights; it remains to be seen how an adjudicator will rule.

In conclusion, when a claimant's representative successfully points out certain procedural irregularities in the handling of a claim; all is not lost. As strange as it may appear sometimes, the merits of a case still count.

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