Appeal P16-00046

OFFICE OF THE DIRECTOR OF ARBITRATIONS

DAVID REEKS

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

BEFORE:	Delegate Jeffrey Rogers
REPRESENTATIVES:	Ms. Angela James, solicitor for Mr. Reeks Mr. Sirus Biniaz, solicitor for State Farm
HEARING DATE:	June 8, 2017

APPEAL ORDER

Under section 283 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 Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. This appeal is dismissed.

2. If the parties are unable to agree about expenses, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

June 23, 2017

Jeffrey Rogers
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Reeks appeals the Arbitrator's decision of May 16, 2016. The Arbitrator ruled that he was precluded from proceeding to arbitration because he did not submit an Application for Accident Benefits within 30 days after he received it and he did not provide a reasonable explanation for his failure to do so.

Mr. Reeks submits that the Arbitrator erred by:

- Finding that he was required to provide a reasonable explanation for his delay, before he could proceed to arbitration

- Failing to consider the information available directly from him in determining whether he should be deemed to have submitted a completed Application for Accident Benefits

- Failing to consider that the previous insurer from which State Farm assumed carriage after resolution of a priority dispute, failed to assist him and failed to inform him of the potential effect of a priority dispute on adjusting his claim

- Failing to consider the effect of the previous insurer's attempt to deflect the claim and its failure to inform him that it would begin to adjust his claim after receiving his Application for Accident Benefits

- Considering when he retained counsel and incorrectly finding that he did so.

For the reasons that follow, I find no error by the Arbitrator.

II. BACKGROUND

Mr. Reeks sustained serious injuries when a motor vehicle struck him on October 8, 2010. On December 2, 2010 he notified Economical Mutual Insurance Company ("Economical") of his intention to apply for accident benefits. Economical was the insurer of the vehicle that hit Mr. Reeks. Economical sent him an Accident Benefits Package on December 2, 2010.

Mr. Reeks submitted an incomplete Application for Accident Benefits to Economical in October 2012. He submitted a completed Application on December 21, 2012.

At the time of the accident, Mr. Reeks had a valid insurance policy with State Farm. Economical served State Farm with a Notice of Priority Dispute upon receiving Mr. Reeks' Application. State Farm promptly accepted priority. About a year later, Mr. Reeks claimed entitlement to income replacement benefits and medical benefits. State Farm refused to pay because of his delay in submitting a completed Application for Accident Benefits.

Mr. Reeks applied for arbitration, after mediation failed to resolve the dispute. The following issue came before the Arbitrator in a Preliminary Issue Hearing:

> Is Mr. Reeks precluded from proceeding with his claim for accident benefits due to his failure to submit a completed Application for Accident Benefits within thirty days of receiving an Application for Accident Benefits package and his failure to provide a reasonable explanation?

The Arbitrator did not accept Mr. Reeks' submission that Economical breached its obligation to assist him. The Arbitrator found that Mr. Reeks did not provide a reasonable explanation for his delay in delivery of a completed Application for Accident Benefits. The Arbitrator therefore found that Mr. Reeks is precluded from proceeding to arbitration.

III. ANALYSIS

This matter involves the intersection of sections 32, 34 and 55 of the *Schedule:*[1]

- Section 32(1) gets the claims process started. It requires a person who intends to apply for accident benefits to notify the insurer of his or her intention to do so, no later than the seventh day after the circumstances arose that gave rise to the entitlement.

- Section 32(2) sets out the insurer's duties upon being notified. The duties include providing the appropriate application forms and information to assist the person in applying for benefits.

- Section 32(5) requires the insured person who has received the forms to submit a completed and signed Application for benefits within 30 days after receiving them.

- Section 34 provides relief from the consequences of breaching the time limits for submitting a completed Application under s. 32. To be entitled to relief, the insured person must provide a reasonable explanation for the breach.

- Section 55 precludes access to mediation under certain circumstances. The circumstances include failing to submit an application for benefits within the prescribed time.

I will first address Mr. Reeks' submission that he was not required to provide a reasonable explanation for his delay in submitting his Application. Then I will consider his submissions regarding the Arbitrator's findings about his explanation.

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

Reasonable Explanation Required

Mr. Reeks submitted a completed Application about 2 years after he received it. He submits that the *Schedule* does not allow State Farm to deny payment as a result. He submits that the only permitted consequence is delay in payment, not denial. I reject this submission.

Mr. Reeks relies on s. 32(10) which states:

> Despite any shorter time limit in this Regulation, if an applicant fails **without a reasonable explanation to notify an insurer under subsection (1) within the time required under that subsection,** the insurer may delay determining if the applicant is entitled to a benefit and may delay paying the benefit until the later of,
>
> (a) 45 days after the day the insurer receives the completed and signed application; or
>
> (b) 10 business days after the day the applicant complies with any request made by the insurer under subsection 33

Section 32(10) forgives delay in notifying an insurer under s. 32(1). That is the section that gets the claims process started by requiring a person who intends to apply for accident benefits to notify the insurer of his or her intention, no later than the seventh day after the circumstances arose that gave rise to the entitlement. Mr. Reeks did not comply with the seven-day requirement of s. 32(1). He notified Economical 55 days after the accident. State Farm did not seek any consequence of his breach of s. 32(1). That was not at issue before the Arbitrator.

Section 32(10) does not forgive breaching the 30-day time limit for submitting an Application for Accident Benefits, imposed by s. 32(5). Relief from that breach is found only in s. 34 which requires a reasonable explanation for the delay. Therefore, the Arbitrator did not err in considering whether Mr. Reeks provided a reasonable explanation.

Mr. Reeks' Explanation

Regarding his explanation, there were three elements to Mr. Reeks' position before the Arbitrator, all of which are reiterated on appeal. First, he submits that he should be deemed to have earlier submitted a completed Application because the insurer had enough information to begin adjusting his claim. Second, he submits that the insurer breached its duty to provide him with information and to assist him in filing his Application, so the insurer should not be entitled to any consequences of his delay. Third, he submits that he has in fact provided a reasonable explanation. I will address his submissions in that order.

Mr. Reeks relies on the decisions in *T.N. and Personal Insurance Company*[2] and *Allstate Insurance Company of Canada and McIntosh (Estate of).*[3] These decisions held that the focus of s. 32(5) is providing information and not completing a specific form. Therefore, where an applicant has provided the insurer with enough information to begin to adjust the claim, he or she is deemed to have submitted a completed Application for Accident Benefits, despite not having completed the form. The Arbitrator distinguished those cases on the facts. He stated:

> The Applicant's reliance on Arbitrator Bayefsky in *T.N. and Personal* and the *McIntosh and Allstate* case can be distinguished in that in both those cases, the Insurer was provided with sufficient information to proceed with adjusting the claim. In this case, neither Economical nor State Farm heard anything from Mr. Reeks or his counsel from December 7, 2010 until October 5, 2012. I can also find no authority to support Mr. Reeks' counsel's contention that there is a positive obligation on the Insurer to remind the Applicant that he has not filed an OCF-1 on a timely basis.[4]

The decisions in *T.N.* and *McIntosh* turned on the specific facts in which insurers had extensive contact with the insured person, but did not receive a completed form. In *T.N.*, the insured person submitted an Application for Accident Benefits shortly after the accident. The insurer was aware of her need for attendant care at that time, but she did not make a specific claim for attendant care benefits until much later. In the interim, the insurer adjusted the file and paid other benefits she claimed. The more important question in that case was not whether the insured person's short

[2]FSCO A06-000399, July 26, 2012

[3]FSCO A02- 001277, April 23, 2004 , upheld on appeal, P04-00019, March 15, 2005

[4]At page 7

delay in submitting her Application for Accident Benefits precluded entitlement, but whether the insurer was required to pay attendant care for the period before it received the specific application for attendant care.

In *McIntosh*, the facts included several meetings with adjusters, extensive conversations with them, receipt of a disability certificate and a treatment plan from the insured's family doctor within a few weeks of the accident, and an offer to settle from the insurer. On appeal, the Director's Delegate found that the facts were "close to the line, and may sit more comfortably as a reasonable explanation case.[5]"The Arbitrator found that the facts in this case are different. Here the insurer had limited contact with Mr. Reeks. The evidence before the Arbitrator supports this conclusion. I find no error.

Mr. Reeks did not press this point in oral submissions. He submitted instead that Economical could have and should have obtained more information from him, but neglected to do so. I reject this submission. The three-step process for the exchange of information under section 32 has been discussed in many decisions. In *McIntosh*, Delegate Makepeace stated:

> …the three-step process prescribed in s. 32 (the claimant contacts the insurer, the insurer provides the appropriate application forms, the claimant submits the forms) places an obligation on the party best positioned to provide the information and documents required at each step, triggering the other party's obligation at the next step.[6]

After Mr. Reeks took the first step in the process, Economical fulfilled the obligations imposed by s. 32(2) when it provided him with an Accident Benefits Package. As the Arbitrator noted: "this package contained all the necessary information which a normally-literate English-speaking adult could understand and appreciate.[7]" Economical also informed Mr. Reeks of the importance of submitting his application within the prescribed time. Economical then sent an adjuster to meet with Mr. Reeks. The adjuster took a statement from him, but did not help him to complete the Application for Accident Benefits or ensure that Economical had enough information to begin to adjust his

[5]At page 9

[6]At page 8

[7]At page 4

claims. However, there is no evidence that Mr. Reeks required assistance and s. 32(2) imposes a duty to provide "information to assist the person". It does not impose a duty to also assist the person. As Delegate Makepeace pointed out in *McIntosh*: "there seems little doubt the legislative intent was that claimants should complete the approved forms supplied by the insurer.[8]"

The approach that Mr. Reeks suggests would effectively render s. 32(5) meaningless. I would expect that in every case, the insurer is in a position to elicit enough information from the insured person to begin the adjusting process. So there would be no point in ever requiring an insured person to complete an Application. The onus would be shifted to the insurer to obtain the information.

The second element of Mr. Reeks' submissions is alleged breaches of the insurer's duties. He submits that Economical breached the *Priority Regulation*[9] by directing him to submit his Application to another insurer. He submits that this breach had the effect of confusing him and that two consequences flow from it: Either the insurer is deprived of any consequences for his breach, or his confusion provides a reasonable explanation for his delay in submitting his application.

At the time of the accident, Mr. Reeks was insured under a valid policy with State Farm, placed on a car he owned. He did not think of the policy as still being in force because his driver's licence had been suspended. He notified Economical, the insurer of the car that hit him, of his intention to apply for accident benefits. Economical promptly sent him the appropriate forms. Economical was aware of the State Farm policy. In its covering letter, Economical informed Mr. Reeks that the forms were to be sent to State Farm. Economical also informed Mr. Reeks that it was required to respond to his application, if he returned the forms to Economical.[10]

[8]At page 7

[9]O. Reg 283/95, Disputes Between Insurers

[10]Insurer's document brief, Tab 2

Economical's adjuster met with Mr. Reeks and took a statement from him on December 7, 2010, five days after sending him the forms.[11] The adjuster also told Mr. Reeks to send his application to State Farm.

Economical's redirection of Mr. Reeks clearly breached s. 2(5) of the *Priority Regulation.* It states:

> An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer.

The Arbitrator did not address this issue. Nevertheless, I find no error in the Arbitrator's conclusion. The only penalty specifically imposed for a breach of s. 2(5) is found in s. 2(7) of the *Priority Regulation.* It requires the insurer who commits the breach to reimburse the other insurer for legal fees and other expenses incurred as a result of the breach. Had the Legislature intended the additional consequence Mr. Reeks proposed, it would have said so. I see no basis for creating the remedy Mr. Reeks proposes when the legislation already allows for Mr. Reeks' circumstances through the "reasonable explanation" provision. If Economical's conduct had the effect of deterring Mr. Reeks or confusing him, that could reasonably explain his delay. But there is no evidence that this conduct by Economical played any part in Mr. Reeks' non-compliance with the time limits. He did say that he "didn't really understand how to do everything,[12]" but there was no evidence that his lack of understanding was influenced by Economical's conduct. His explanation for the delay was that he "thought the lawyers were doing everything,[13]"

This brings me to the third element of Mr. Reeks' submissions: that he gave a reasonable explanation for the delay. In January 2011, Economical received a letter from Mr. Reeks' lawyers. The lawyers advised that they represented Mr. Reeks regarding the accident, that he was uninsured, and they requested the forms required for applying for accident benefits. Economical

[11]Insurer's document brief, Tab 3

[12]Transcript of evidence-in-chief, page 8

[13]Transcript of cross-examination, page 23

replied that Mr. Reeks was insured with State Farm and that Mr. Reeks had already received the forms. Neither Economical nor State Farm had any further contact with Mr. Reeks until October 2012, when Economical received an incomplete Application for Accident Benefits from Mr. Reeks' lawyers.

Critical to the Arbitrator's approach to this issue was his finding of fact that Mr. Reeks retained counsel to represent him in his claim for accident benefits no later than January 2011. The Arbitrator stated:

> …counsel claimed that although Mr. Reeks had retained counsel for his tort claim, no counsel had been retained for the accident benefit file.
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> I believe that Baldwin Law's letter to Economical of January 19, 2011 and Economical's subsequent response of February 9, 2011 negate these claims. Baldwin Law's letter specifically states, "This is written notice that Mr. Reeks will be making an Application for Accident Benefits to Economical Insurance. Kindly provide Mr. Reeks with the appropriate OCF forms."[14]

The evidence before the Arbitrator supports his finding of fact. As the Arbitrator noted, this finding of fact engages the logic the Court of Appeal applied in deciding *Cervo v. State Farm Automobile Insurance Company.*[15] The Court held that reliance on counsel is not a reasonable excuse and that an insured person's limitations in complying with the time limits for applying for accident benefits are negated when counsel is retained, since counsel is not hampered by the same limitations. The Court stated:

> It was argued before the motion judge that Cervo had reasonable excuses for his failure to apply in a timely fashion for benefits because (1) he relied on his solicitor, (2) it was not clear whether a forklift was an automobile under the Act, and (3) the complexity between the tort claims and the rights under the SABS required a second opinion.
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> In detailed reasons, the motion judge rejected each excuse advanced by Cervo.

[14]At page 6

[15]2006 CanLII 37119 (ONCA), the Arbitrator cited the case as *Cervo v. Raimondo*.

Cervo's reliance on his solicitor

> First, the motion judge found that the solicitor was the agent of the client and that as far as third parties were concerned, [page218] the actions of a solicitor are the actions of the principal where the actions are taken in the course of dealing with the client's case. The motion judge relied on arbitral jurisprudence that mere reliance on counsel cannot serve as an excuse: see *Barry Carruthers and Royal & SunAlliance Insurance Company of Canada*, unreported, FSCO A99-000923, May 30, 2002.
>
> An attempt was made to distinguish the status of the client from the status of the solicitor. It was argued that because Cervo was 19 years of age, lived at home with his parents, had a Grade 11 education and worked as a labourer, these characteristics would somehow constitute a valid excuse for the failure to give notice. However, the solicitor was not hampered by any of these alleged limitations.
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> …
>
> In the present case there was no evidence of any limitation between the client and the solicitor or on the solicitor's authority to act for his client. I agree with the motion judge that mere reliance on the solicitor was not a reasonable excuse. [16]

I reject Mr. Reeks' submission that *Cervo* can be distinguished. *Cervo* was decided under a previous version of the *Schedule.*[17] The notice and application provisions were found in s.59 and they were similar to the current s.32. Section 59(4) allowed forgiveness of breaches of both the time limit for notifying, and the one for applying. The insured person had to provide a reasonable excuse. As I noted earlier, because of s. 32(10), the current *Schedule* does not impose the penalty of disentitlement for breach of the time limit for notifying. In those circumstances, the insurer is only allowed to delay payment. *Cervo* involved a breach of the time limit for notifying, but its principles still apply to this case. The issue in *Cervo* was whether retaining counsel could be seen as a reasonable excuse. Although the issue arose in the context of a failure to notify, the Court's direction on what constitutes a reasonable explanation cannot be ignored.

[16] At paragraphs 42-47

[17] *Statutory Accident Benefits Schedule — Accidents After December 31, 1993 and Before November 1, 1996*, O. Reg 776/93

The only explanation that Mr. Reeks offered in his evidence was that he just did not understand and that he thought his lawyers were taking care of everything. Based on *Cervo*, the Arbitrator could not have erred in taking into account the fact that Mr. Reeks had a lawyer. *Cervo* negates the explanation Mr. Reeks offered and it also negates the additional explanations, raised only in submissions: that he was misled, impaired etc. There is simply no explanation for the delay between January 2011, when Mr. Reeks retained counsel, and December 2012, when he finally submitted a completed Application for Accident Benefits.

The Arbitrator did not err in concluding that Mr. Reeks did not provide a reasonable explanation for his delay in submitting a completed Application for Accident Benefits and that he was therefore precluded from proceeding to arbitration. As a result, this appeal is dismissed.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers Director's Delegate	June 23, 2017 Date