LICENCE APPEAL TRIBUNAL | TRIBUNAL D’APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario | Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: **Joseph Vettese vs. TD Insurance Meloche Monnex, 2019** ONLAT **18-008337/AABS**

Date: October 2, 2019
File Number: 18-008337/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

JV

Appellant

and

TD Insurance Meloche Monnex

Respondent

DECISION

ADJUDICATOR: **Christopher A. Ferguson**

COUNSEL FOR THE APPLICANT: Bryan Fromstein

COUNSEL FOR THE RESPONDENT: Patrick Baker

HEARD in Writing: **June 3, 2019**

REASONS FOR DECISION

OVERVIEW

[1] The applicant, JV, was involved in an automobile accident on May 4, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*"). He applied for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("the Tribunal") when his insurer, Pembridge Insurance Company ("Pembridge") denied his claims.

[2] The respondent, TD General Insurance Company ("TD"), notes that it has taken over the handling of JV's claim from Pembridge, as it has accepted priority of payment over Pembridge. It did so after this proceeding commenced.

[3] TD has raised a preliminary issue that could prevent the Tribunal from hearing JV's appeal of its decision to deny his claim for income replacement benefits (IRBs). TD asserts that JV is precluded from appealing its refusal to pay IRBs because JV failed to provide it with a Disability Certificate ("OCF-3").

[4] On March 4, 2019, the Tribunal issued an order that the preliminary issue be heard in advance of any hearing of the substantive IRB entitlement issues in this matter.

PRELIMINARY ISSUE

[5] The issue to be decided by the Tribunal is:

1. Is JV precluded from proceeding with this appeal because he has not provided TD with an OCF-3 to support his claim?

RESULT

[6] TD's motion to preclude JV's appeal on its refusal to pay IRBs from proceeding is allowed.

[7] JV's request for relief from forfeiture is denied.

ANALYSIS

[8] Subsection 36(1) of the Schedule prescribes that "specified benefit" means an IRB, among other benefits listed.

[9] Subsection 36(2) of the Schedule prescribes that an applicant for a "specified benefit" shall submit a completed OCF-3 with his or her application for benefits.

[1] O.Reg. 34/10.

[10] Subsection 36(3) prescribes that an applicant who fails to submit a completed OCF-3 is not entitled to a specified benefit for any period before the completed disability certificate is submitted.

[11] Under s.37(1) of the Schedule, an insurer may request a new, updated OCF-3 if it wishes to determine whether the insured person is still entitled to a specified benefit.

[12] Subsection 37(3) prescribes that if an insured person fails to submit a completed OCF-3 as required under subsection 37(1), no specified benefits are payable for the period commencing the 15th business day after the day the insured person received the insurer's request and ending, if the insured person subsequently submits a completed disability certificate, the day the insurer receives the completed disability certificate.

Did JV submit an OCF-3 with his application for IRBs?

TD's Account of Events

[13] JV filed his appeal on September 6, 2018. Pembridge took the position that IRBs are not payable to JV as no OCF-3 was ever submitted to support it. TD adopts this position.

[14] TD asserts that JV never submitted an OCF-3 to Pembridge, which in turn never determined JV's IRB entitlement. JV, it asserts, did not provide an OCF-3 until on or about January 3, 2019 when he included an OCF-3 in the Case Conference (CC) Summary served on Pembridge's legal counsel in this matter. The OCF-3 is dated August 4, 2016 but bears no facsimile stamp and it is unaccompanied by any evidence that it was delivered to Pembridge at any time prior to January 2019.

[15] TD notes that Pembridge sent two letters to JV, dated August 18, 2016 and September 9, 2016 respectively, requesting an OCF-3 to support his IRB claim. The letter of September 9, 2016 was clear that no IRBs would be payable for any period before an OCF-3 was submitted.

[16] Pembridge neither approved nor denied JV's IRB claim. It did not arrange for insurer's examinations (IEs) on the IRB claim, on the basis that IRBs "were never properly applied for."

[17] TD asserts that there is no evidence in any form to substantiate any claim by JV that he or any medical service provider submitted an OCF-3 before the CC, about 2½ years post-accident.

[18] TD highlights its evidence that JV provided no medical evidence to support his IRB claim extensively at paragraphs 4-9, 19-20 and 32-35 of its submissions. It submits that there are no clinical notes and records, no OHIP summaries and no medical reports to support any of JV's claims, either to TD or in submissions for the purposes of the hearing, other than the chronic pain report, which was based

on an examination conducted more than 104 weeks post accident, and a month after JV filed his appeal.

TD's Position

[19] TD submits that JV's "failure to submit an OCF-3 and thus complete his IRB application within 104 weeks should act as a complete bar to this proceeding." He characterizes s.36(2) as a strict requirement, noting that s.36(3) has been interpreted to bar entitlement to receive IRBs for any period prior to the receipt of an OCF-3 even if otherwise entitled to IRBs.[2]

[20] TD notes that JV did submit an Employer's Confirmation Form ("OCF-2") dated August 28, 2016 and signed by his employer. It asserts that this is no substitute for an OCF-3, as the OCF-2 speaks only to the calculation of the quantum (dollar amount) of IRBs being claimed.[3]

[21] TD submits that "Section 5(1)(1) and sections 36(2) and (3) set out the clear requirements for an individual to make an IRB claim. Read together, these provisions set out a clear and mandatory requirement that an insured person must meet the relevant disability test within 104 weeks and is not entitled to receive any IRB before such time as he or she provides a completed OCF-3."

[22] TD submits that JV "failed to submit a completed OCF-3, or indeed any OCF-3, until January 3, 2019 - a period of 139 weeks from the date of the accident. [JV] is therefore not entitled to receive an IRB for any point before January 3, 2019 and is thus not entitled to receive any IRB within the 104-week period."

[23] TD argues that "Reading the basic [IRB] entitlement requirements of s.5(1)(1) together with s.36(3), it is clear that the Schedule requires that an application for IRB be made within 104 weeks. [JV] failed to make such application, and his claim should be barred."

[24] TD submits that "allowing [JV] to proceed with this dispute would be contrary to the clear intention of the *Schedule.* [JV] has failed to submit a completed OCF-3 within 104 weeks and has therefore advanced a post-104 claim for benefits without first satisfying any pre-104-week entitlement, something that is not contemplated under the *Schedule.* To establish entitlement to post-104 payment of benefits, [JV] must establish that he suffers a complete inability to engage in any employment for which he is reasonably suited by education, training, or experience - which is substantially different than the test for basic IRB entitlement at section 5. Moreover, if an insured does not qualify for basic entitlement to IRB under the substantial inability test, then he or she cannot qualify for the post-104 test."

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[2] Citing *H v. Certas Ins. Co.,* 17-002910/AABS, at para. 11. and *PM v. RBC Gen. Ins. Co.,* 2017 CanLII 85689 (LAT), at para. 116.

[3] TD cites *DW v. The Co-Operators,* 2018 CanLII 8092 (LAT-Recon), at paras. 26-27 to support this assertion.

[25] TD asserts that JV's "failure to apply for IRB" has denied it "any reasonable opportunity to assess him pursuant to section 44 of the Schedule." TD is now prejudiced as it is "wholly unable to obtain IEs in order to determine if [JV] did suffer a substantial inability to engage in pre-accident employment as a result of this accident. Any IE that is obtained in the post-104 period is obviously unable to determine whether [JV] was disabled in the 104-week period and can only provide an opinion on his contemporary function."

JV's Version of Events

[26] JV does not deny that Pembridge never received his OCF-3 nor does he make a clear claim that it was actually submitted any time before January 2019. He does not deny receiving letters from Pembridge seeking an OCF-3.

[27] JV indicates that his lawyers have written the chiropractor, Dr. Jamshed Rahim, whose name appears on the OCF-3, six times and telephoned him six times, all with no response. JV is unable to obtain the full medical file that would reveal whether the OCF-3 was sent to the insurer.[4]

JV's Position

[28] JV contends that barring his appeal is an excessive, harsh response to a technical breach, and urges me to follow the example of other adjudicators in similar cases dealing with specified benefits:

i. Where it is shown that the information missing for lack of an OCF-3 is available to the insurer in the OCF-1, requiring strict compliance with the completion of an OCF-3 without explanation or reason is a harsh consequence which s.36(3) was not meant to impose.[5]

ii. The Schedule is consumer protection regulation and should not be interpreted in a manner that dismisses an insured's claim because of something that may be a technical error.[6]

[29] JV also submits that Pembridge's log notes confirm the insurers' awareness that JV was unable to work as a result of his accident-related injuries and that this means that they had all the information they needed to process his IRB claim, and that they were aware of it. He also asserts that log note evidence that a claims adjuster was calculating the quantum of a potential IRB claim is also evidence that the insurer had all the information it needed. Although JV's submission is unclear, I read it as his position that the information from these log notes obviates the need for an OCF-3 in support of his claim.

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[4] Supported by an affidavit sworn by Vanessa Femia, Law Clerk dated May 9, 2019.

[5] *16-003897 v TD General Insurance Company*, 2017 CanLII 69447 (ON LAT), at paragraph 31.

[6] *17-002465 v Aviva Insurance Canada*, 2018 CanLII 13171 (ON LAT), at para. 22

Findings

[30] JV's IRB appeal is precluded from proceeding because he failed to submit an OCF-3 with his claim for IRBs, as required by law.

[31] I agree with TD that s.36 creates strict requirements. I also agree that a complete claim for IRBs must be made within 104 weeks of the accident. I find that JV failed to meet these requirements. JV makes no argument that a proceeding may not be effectively barred for non-compliance with s.36 and the caselaw in submissions provides ample precedent for barring non-compliant IRB claims from proceeding to appeal.

[32] I do not accept JV's position that omitting an OCF-3 is merely a technical breach or error that should not affect his appeal. My reasons for rejecting this argument are:

i. JV's assertion that TD had "all the information it needed" is refuted by TD's uncontroverted assertions that JV never provided any medical evidence to support an IRB claim until he produced a chronic pain report dated November 25, 2018[7] and then his OCF-3 in this proceeding. No explanation is offered by JV for this paucity of proof. This was the basis of JV's case, and it fails because no plausible argument can be made that the OCF-3 is "technical" or unnecessary in the absence of other medical information.

ii. I reject JV's assertions about Pembridge's log notes. They don't support his case. First, JV speaks to Pembridge being "aware of" his IRB claim. This is meaningless because Pembridge never denied awareness of his IRB claim, and "awareness" is irrelevant. Second the log notes prove nothing about "sufficient information" to obviate the insurer's need for an OCF-3, because:

   a. Nothing in the log notes indicates to me that the adjuster was endorsing any of JV's claims. I read them as simply stating what JV has claimed or reported with respect to his inability return to work – the same log notes also include entries of "employed and working". Indeed, in the May 8, 2017 log note specifically cited by JV, the adjuster speculates that the lack of OCF-3 or treatment plan as of that date might mean that he "has returned to work".

   b. The log notes include multiple entries about JV's failure to submit any of the medical documentation needed by the insurer to approve claims. This does not suggest to me that the insurer had "sufficient information". It supports TD's position that it did not.

[77] The chronic pain report does not speak to ability to work or IRB entitlement.

c. Pembridge's readiness to calculate the quantum of JV's potential IRB claim cannot be fairly interpreted as a concession that all the other information it needs to determine his claim. Such a finding would discourage insurers from proactively adjusting claims. It would produce the absurd result of equating required employment and financial information with required medical information, when the Schedule plainly differentiates between the two by prescribing two different forms for submitting the two distinct types of information.

iii. JV supports his "technical breach argument" with cases that do not support the contention that the OCF-3 is merely technical. In fact, I read the cases he cites as supporting the argument that failure to submit an OCF-3 may indeed act as a bar to appeal. In neither case did the adjudicator make a finding that would contradict this argument. The cases cited by JV do not persuade me because they turned on facts that are distinguishable from the instant case:

a. In *17-002465 vs. Aviva*[8] there was evidence in the form of an invoice to Aviva for an OCF-3 and Aviva conceded misplacing the invoice. That evidence strongly suggested that an OCF-3 was in fact submitted and compliance achieved. The adjudicator's comments noted by JV, were therefore made in the context of a case in persuasive evidence of compliance existed. Little such evidence exists here.

b. In *16-003897 vs. TD*[9] the claimant (or his service providers) submitted three OCF-3s and these were challenged by the insurer, unsuccessfully, for being "incomplete. The adjudicator's comments were made in the context of evidence of compliance and where information missing from an OCF-3 was available elsewhere. That context is missing from this case.

c. In *16-003897 vs. TD*[10] the adjudicator's comments were conditional on it being shown that the information missing for lack of an OCF-3 is available to the insurer on the OCF1. That is not the case here. JV's OCF-1, dated July 27, 2016, includes a simple check of a box indicating "yes" to the form's question of "do your injuries prevent you from working?" I do not find this to substitute for the detailed medical information included in an OCF-3 and the signature/verification provided therein by a licensed medical practitioner. There is no basis for any claim that the OCF-1 provided all the information TD needed and that would be included in the OCF-3.

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[8] Ibid.

[9] See footnote 4 above.

[10] See footnote 4 above.

Is JV entitled to relief from forfeiture?

[33] Section 129 of the *Insurance Act*[11] ("the Act") provides that:

> "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."

[34] It is unclear to me that s.129 confers jurisdiction on the Tribunal to grant equitable relief in the context of claims application requirements prescribed by the Schedule. However, in case that jurisdiction does exist, I have reviewed the parties' submissions against the factors to be considered for granting relief from forfeiture, which are set out in a case called "*Kozel*".[12] The factors are:

1. the conduct of the applicant;

2. the gravity of the breach, based on the nature of the breach itself and the impact of that breach on the rights of the other party[13]; and

3. the disparity between the value of the property forfeited and the damage caused by the breach, which requires a comparison between the loss of coverage and the extent of the damage caused by the insured's breach.[14]

[35] JV argues that factor 1 applies because he "acted reasonably. He relied on his chiropractor to deliver the disability certificate [OCF-3]. The [Schedule] is consumer protection legislation."

[36] I disagree with JV. I reject the implicit position that the "consumer protection" purpose of legislation or regulation relieves him from a duty to comply with the law or to meet the requirements for claiming insurance benefits. The onus is on applicants to establish their entitlement to benefits. They have a duty to comply with the prescribed process for doing so. Failing to do so isn't "minor."

[37] I also disagree with JV's characterization of his conduct as reasonable, because:

i. JV's attempts to get Dr. Rahim to submit the OCF-3 are uncompelling as JV provided no evidence of any effort during the 2½ years between his letters of August 15, 2016 and April 3, 2018 to get the OCF-3 -- despite getting two letters from Pembridge dated August 18, 2016 and September

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[11] *Insurance Act*, RSO 1990, c.I.8

[12] *Kozel v. The Personal Insurance Company*, 2014 ONCA 130 (CanLII), paragraph 31, led by JV.

[13] Ibid., paragraph 67.

[14] Ibid. paragraph 69.

9, 2016 respectively urging him to do so and reminding him that his claim could not be processed without the OCF-3.

ii. The flurry of letters and calls to Dr. Rahim in late 2018 and early 2019 set out in Ms. Fiema's affidavit strikes me as effort aimed at preparing for litigation, given the date JV's appeal was filed than a *bona fide* effort to comply with the Schedule.

iii. JV provides no evidence or argument that he tried to communicate his difficulty in obtaining an OCF-3 to Pembridge, and he offers no explanation of why he didn't try to furnish Pembridge with his copy the OCF-3 dated August 4, 2016 as a show of good-faith efforts to meet the prescribed requirements for completing his claim.

iv. JV's failure to provide any other medical evidence in support of his IRB claims within the 104 weeks after his accident is a failure, in my mind, to provide the insurer with the kind of information that might allow or induce it to waive the OCF-3 requirement and finish making an IRB determination. This is unreasonable.

v. I note that JV was 19 years old at the time of the accident. However, the evidence indicates that by August 2016 he was represented by legal counsel who were aware of the OCF-3 issue and dealing with it. I find that this offsets any concerns about JV's youth and inexperience or his injuries in meeting his compliance obligations.

[38] JV argues that factor 2 applies because "[t]he nature of the breach is extremely minor given that the insurer had before it all of the information that would have been available to it in an OCF3."

[39] For the reasons given above, I reject JV's claim that the insurer had all the information that would have been available to it in an OCF-3 and thus I reject his premise that factor 2 applies to this case.

[40] JV argues that third factor applies because "the loss of coverage to the Applicant would be significant. There is no damage to the insurer as a result of the failure to complete an OCF-3."

[41] I do not find that JV's application of factor 3 to this case is persuasive because:

iv. It does not account for the prejudice against the insurer of being unable to conduct a meaningful insurer's examination (IE) more that three years after the accident. While the breach *per se* doesn't cause the insurer a loss, using relief of forfeiture to allow JV's appeal to proceed exposes the insurer to the incurred expenses of further proceedings and, likely, an IE.

v. JV has not established what his loss would be. In *Kozel*, the insured stood to lose $1M in insurance coverage, where the court found that the

insurer was not prejudiced. JV has not lost insurance coverage (the value of which can be quantified, and the loss of which is manifestly severe) – he has lost his opportunity to proceed with this appeal. JV doesn't provide an estimate of quantum for IRBs "lost". I saw nothing in Kozel to support considering a hypothetical loss – one depending on success in litigation -- in determining the proportionality of impacts.

vi. Lastly, while the loss of coverage in Kozel was a certainty, JV's loss of IRBs is not. TD's uncontested evidence is that JV has provided little persuasive medical evidence in support of his IRB entitlement, and missed the 104-week deadline for staking his IRB claim. The issue has not been litigated, making it possible that a realistic assessment of JV's "IRB loss" could be zero.

vii. Nothing in *Kozel* indicates to me that being precluded from his appeal for failing to meet prescribed requirements represents a "loss" that should be considered in granting relief from forfeiture. None of the cases cited in *Kozel* involved any such issue or finding.

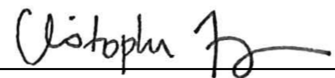
[42] JV's request for relief from forfeiture is denied.

CONCLUSION

[43] JV's appeal is precluded from proceeding because he failed to meet the prescribed requirements to apply for IRBs, specifically the submission of an OCF-3.

[44] JV's request for relief from forfeiture is denied.

Released: **October 2, 2019**



Christopher A. Ferguson
Adjudicator