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RECONSIDERATION DECISION

Before: D. Stephen Jovanovic

Date: April 17, 2019

File: 17-006563/AABS

Case Name: S.C. v. Allstate Insurance Company of Canada

Written Submissions by:

For the Applicant: Darcy R. Merkur

For the Respondent: Jennifer Griffiths

OVERVIEW

- [1] This decision deals with a request for reconsideration focusing on a single question: whether the applicant is entitled to case management services under s. 17(1)(b) of the *Statutory Accident Benefits Schedule*, O. Reg 34/10 simply because she purchased the optional benefits described in s. 28(1)5 or, instead, whether she needs to have suffered a catastrophic impairment before being entitled to those services?
- [2] The Tribunal held that the applicant needed to have suffered a catastrophic impairment before being entitled to case management services. In the Tribunal's words:
- I find s. 17(1)(b) when read in conjunction with s. 28(1) 5 of the *Schedule* provides an insured with entitlement to claim case management services if the optional catastrophic impairment benefit has been purchased and the insured has been deemed to have sustained a catastrophic impairment as a result of the accident.
- [3] The applicant purchased a policy of automobile insurance from the respondent with the optional catastrophic impairment benefit as described in s. 28(1)5. She was later injured in a motor vehicle accident and subsequently claimed entitlement to case management services. The parties agree that the applicant had not been deemed to have suffered from a catastrophic impairment.
- [4] The applicant submits that the Tribunal made seven significant errors of law, dealt with below, in interpreting the above sections of the *Schedule*. In essence, she argues that the Tribunal made a significant error of law that, if corrected, would likely have resulted a different decision: see Rule 18.2(b) of the Tribunal's *Rules of Practice and Procedure, Version 1 (April 1, 2016)*.
- [5] I have been delegated the authority to decide her reconsideration request by the Executive Chair pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability Governance and Appointments Act, 2009*, S.O. 2009, c.33, Sched. 5.
- [6] For the reasons that follow, I confirm the Tribunal's decision.

ANALYSIS

- [7] The relevant sections of the *Schedule* are as follows:

Case manager services

17.(1) Subject to subsection (2), medical or rehabilitation benefits shall pay for all reasonable and necessary expenses incurred by or

on behalf of an insured person as a result of the accident for services provided by a qualified case manager in accordance with a treatment and assessment plan under section 38,

(a) if the insured person sustains a catastrophic impairment as a result of the accident; or

(b) if the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28(1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28(1) is available to the insured person.

(2) The insurer is not liable to pay expenses for case manager services that exceed the maximum rate or amount of expenses established under the guidelines.

...

Description of optional benefits

28.(1) Every insurer shall offer the following optional benefits:

...

5. An optional catastrophic impairment benefit for medical, rehabilitation and attendant care benefits of up to \$1,000,000 if the insured person sustained a catastrophic impairment as a result of the accident.

[8] The applicant's position is that, even though she has not sustained a catastrophic impairment, she is entitled to claim case management services under s. 17(1)(b) because she purchased the optional coverage under s. 28(1)5.

[9] The applicant submits that, in deciding otherwise, the Tribunal made the following significant errors:

(a) It failed to find that she was entitled to case management services on a plain reading of sections 17(1)(b) and 28(1)5.

(b) It stated that the word "if" in section 28(1)5 created a contingency or condition to the operation of section 17(1)(b).

(c) It caused a critical part of section 17(1)(b), the word "or," to become redundant.

(d) It misdirected itself and over-generalized sections 17(1) and 28(1)5.

(e) It misdirected itself by relying on general principles of statutory interpretation contained in *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 SCR instead of relying on principles governing the interpretation of coverage provisions within legislation with a consumer focused objective such as the SAABS and in particular in cases like *Smith v. Cooperators Insurance Company*, [2002] 2 SCR 129 and *Monks v. ING Insurance Company of Canada*, 90 O.R. (3d) 689 (ONCA).

(f) It failed to interpret the relevant sections broadly and in favour of the applicant.

(g) It failed to consider or properly apply the principle of uniform/consistent expression as described in *R. v. Zeolkowski*, [1989] 1 SCR 1378 in its interpretation of section 17(1)(b) vis-à-vis sections 19(3)(1) and (3) and 30(1)(5). Specifically, the Tribunal's conclusion that "available" has the same meaning as "purchased and applicable" used in the same context in sections 19(3)(1) and (3) and 30(1)(5).

[10] Before examining these alleged errors, it would be useful to outline the accepted rules of statutory interpretation. The Tribunal relied on *Rizzo* in holding that the words of an Act or the *Schedule* "are to be read in their entire context and grammatical and ordinary sense with the scheme and object of the Act, and the intention of parliament." In my view, there was no error in so doing. That is trite law.

[11] Indeed, in *Ayr Farmers Mutual Insurance Company v. Wright*, 2016 ONCA 789, the Court of Appeal restated the relevant principles of statutory interpretation, including those enunciated in *Rizzo*, in a matter involving the *Insurance Act*. The Court wrote the following at paras. 26-30:

26. The modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1S.C.R. 27, at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p. 87. See also *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 18; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, 395 D.L.R. (4th) 656, at para. 27; *Rooney v. ArcelorMittal S.A.*, 2016 ONCA 630, at paras. 10-21.

27. The rules governing statutory interpretation apply equally to regulations. Importantly, a regulation must be read in the context of the enabling Act, having regard to the purpose of the enabling provisions: *Bristol-Myers Squib Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paras. 37-38.

28. The modern approach to statutory interpretation involves a textual, contextual and purposive analysis of the statute or provision in question.

29. Three factors must be examined: “the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found”: *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.*, 2008 ONCA 561, 91 O.R. (3d) 321 at para. 23.

30. In *Amos v. Insurance Corporation of British Columbia*, [1995] 3 S.C.R. 405, at para. 17, Major J. observed that although statutory language cannot be stretched beyond its ordinary meaning, the statute cannot be construed in such a way that defeats the object and intent of the legislation providing coverage to the insured person.

[12] More recently, in *Skunk v. Ketash*, 2018 ONCA 450, the Court made the following additional comments about the proper approach to statutory interpretation:

8. The principles of statutory interpretation require that the court first look to the plain meaning of the statute. If the words have a plain meaning and give rise to no ambiguity, then the court should give effect to those words.

9. As a general rule, clauses in insurance policies will be granted a liberal meaning “in favour of the insured and those clauses excluding coverage [will be] construed strictly against the insurer....”

[13] In this case, the Tribunal’s conclusion is summarized in the following three paragraphs of its decision:

24. I find the applicant is not entitled to claim the benefit of case manager services. I find the plain language reading of s. 17(1)(b) read in conjunction with s. 28(1)5 of the Schedule provides an insured with an entitlement to claim case management services if the optional catastrophic impairment benefit has been purchased and the insured has been deemed to have sustained a catastrophic impairment as a result of the accident. As of the hearing, the parties

concede the applicant's injuries have not been deemed catastrophic.

25. I rely on the Supreme Court of Canada's decision, *Rizzo v. Rizzo Shoes* which emphasizes the words of an Act (in this case, the *Schedule*) are to be read in their entire context and grammatical and ordinary sense with the scheme and object of the Act, and intention of parliament. The *Schedule* specifically notes under s. 17(1)(b) that an insured person is entitled to claim case manager services when the catastrophic impairment benefit in paragraph 5 of subsection 28(1) is **available** [emphasis mine] to the insured person. The *Schedule* further noted under paragraph 5 of subsection 28(1), an optional catastrophic impairment benefit for medical, rehabilitation and attendant care benefits up to \$1,000,000.00 **if** [emphasis mine] the insured person sustained a catastrophic impairment as a result of the accident. It is the word **if** that confirms that contingency.

26. Therefore it is not the purchase of this optional catastrophic impairment benefit alone under s. 28(1)5 which makes the benefit available to the insured person, but rather the purchase of the optional catastrophic benefit and then the insured person sustaining a catastrophic impairment as a result of the accident which triggers the right to claim the optional catastrophic benefit which would include case manager services

- [14] Taking into account the above rules of statutory interpretation, I am not satisfied that the Tribunal made any significant error of law such that the Tribunal would likely have reached a different decision. Reading the words of the *Schedule* "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" supports this conclusion
- [15] The errors alleged by the applicant set out in paragraph 10 above ignore the plain reading of the relevant sections of the *Schedule*, as was decided by the Tribunal. Section 17(1)(b) requires that the optional benefit be "available" while s. 28(1)5 provides for catastrophic impairment benefits if the insured person sustains a catastrophic impairment as a result of the accident. I cannot say that the Tribunal made a significant error of law when it concluded that the optional benefit would only be "available" to the applicant if she sustained a catastrophic impairment as required in s. 28(1)5.
- [16] The applicant's final submission as set out in paragraph 10 (g) above is that the Tribunal made a significant error of law when it gave the word "available" the same meaning as "purchased and applies" or its variants in sections 19(3)1 and 3 and 30(1)(5) of the *Schedule*. Put another way, the applicant argues that given the fact

that the phrase “purchase and applies” or its variant is used elsewhere in the *Schedule*, the phrase “available” must have a different meaning. These sections for comparison are as follows.

19.(3)1. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28(1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28(1) has not been purchased and does not apply to the insured person.....

19.(3)3. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28(1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28(1) has been purchased and applies to the insured person....

30.(1)5. If the optional catastrophic benefit referred to in paragraph 5 of subsection 28(1) was purchased and is applicable to the insured person...

- [17] The fact that the phrase “purchased and applies” or its variant is used in these sections is not of any assistance. The words of the benefit must still be read in their entirety.
- [18] Does the fact that variants of the word apply are used in the above sections lead to a different interpretation of section 28.(1)5? The applicant has not provided any authority to satisfy me that it does.
- [19] A historical review of the predecessor sections does not change this conclusion. Section 17(1)(a) and (b) of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996* version of the *Schedule* read as follows.

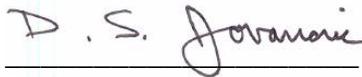
17(1) The insurer shall pay all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for services provided by a qualified case manager in accordance with a treatment plan if,

- (a) the insured person sustains a catastrophic impairment as a result of the accident; or
- (b) the accident occurred on or after October 1, 2003 and the optional medical, rehabilitation and attendant care benefit referred to in section 27 has been **purchased and applies** to the insured person (emphasis added).

[20] I cannot say that the change in wording from “purchased and applies” to “available” leads to a different conclusion about the meaning of the current section 17(1)(b) than reached by the Tribunal. From a linguistic perspective, I cannot attribute a different interpretation to section 17(1)(b) because of the change in wording.

CONCLUSION

[21] Pursuant to the Tribunal’s rule 18.4(b) the decision of the Tribunal dated June 13, 2018 is confirmed.

A handwritten signature in black ink that reads "D. S. Jovanovic". The signature is written in a cursive style and is positioned above a horizontal line.

D. Stephen Jovanovic

Associate Chair

Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: April 17, 2019