



Citation: Alkhazov v. Aviva Insurance Company of Canada, 2022 ONLAT 21-004825/AABS - M

Licence Appeal Tribunal File Number: 21-004825/AABS

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

Between:

Oleg Alkhazov

Applicant

and

Aviva Insurance Company of Canada

Respondent

MOTION DECISION

ADJUDICATOR: Samia Makhamra, Adjudicator

APPEARANCES:

For the Applicant: Kateryna Vlada, Representative for the Applicant

For the Respondent: Jonathan Charland, Counsel

**Heard by Way of Written
Submissions**

BACKGROUND

- [1] The Applicant was injured in an automobile accident on April 18, 2019 and sought benefits from the Respondent, pursuant to the *Statutory Accident Benefits Schedule*¹ (*Schedule*).
- [2] The parties participated in a case conference on March 14, 2022. The matter was set down for a videoconference hearing on November 29 to December 1, 2022. The issues in dispute include a non-earner benefit and several medical and rehabilitation benefits.
- [3] Subsequently, the Respondent filed a motion raising a preliminary issue, which is the subject of this decision. If the Respondent is successful, the remaining issues in the application may proceed entirely in writing, instead of videoconference.

PRELIMINARY ISSUE IN DISPUTE

- [4] The preliminary issue is:
 - Is the Applicant barred from proceeding with his claim for a non-earner benefit as he failed to submit an OCF-10 form electing benefits?

RESULT

- [5] The Applicant is barred from proceeding with his claim for a non-earner benefit for failing to submit an OCF-10.

BACKGROUND

- [6] On April 23, 2019, the Applicant filed an Application for Accident Benefits (OCF-1). The OCF-1 indicated that, at the time of the accident, the Applicant was employed and working as a mortgage broker at Benson Mortgages, and that he had returned to work on April 19, 2019. Under part 3 of this form, he indicated that he was unable to return to his normal activities following the accident.
- [7] On June 4, 2019, the Applicant filed a Disability Certificate (OCF-3). The OCF-3 indicated that he was substantially unable to perform the essential tasks of his employment and could not return to work on modified hours and/or duties, and that he suffered a complete inability to carry on a normal life.
- [8] In a letter dated June 10, 2019, the Respondent acknowledged receipt of the OCF-3, and denied the claim for an Income Replacement Benefit (IRB) and a

¹ Effective September 1, 2010 (Including amendments effective June 1, 2016), O. Reg. 34/10.

Non-Earner Benefit (NEB) because the OCF-1 indicated he had returned to work. The Applicant was advised of his right to dispute the Respondent's decision through the Licence Appeal Tribunal. The Applicant was also advised that should he wish to claim these benefits, pursuant to section 33 of the *Schedule*, further documents would be required, such as an Employer's Confirmation Form (OCF-2), post-accident income documentation, and an Election of Income Replacement, Non-Earner or Caregiver Benefit (OCF-10).

- [9] In a letter dated June 14, 2019, the Respondent acknowledged receipt of the OCF-1 and OCF-3 and noted that the Applicant met the eligibility requirements for more than one benefit, IRB and NEB. Pursuant to section 35(1) of the *Schedule*, the Respondent requested that the Applicant submit an OCF-10.
- [10] On April 12, 2021, the Applicant filed an application with the Licence Appeal Tribunal.
- [11] To date the Applicant has not submitted an OCF-10.

ANALYSIS

- [12] On the evidence and submissions, I find that the Applicant was required to submit an OCF-10. As he has not done so, he is barred from proceeding with his claim for a NEB.
- [13] Relevant to my determination is section 35(1) of the *Schedule* which provides:

If an application indicates that the applicant may qualify for two or more of the income replacement benefit, the non-earner benefit and the caregiver benefit under Part II, the insurer shall, within 10 business days after receiving the application, give a notice to the applicant advising the applicant that he or she must elect, 30 days after receiving the notice, the benefit he or she wishes to receive.
- [14] There is no dispute that the Applicant did not submit an OCF-10 to inform the Respondent whether he was pursuing an IRB or a NEB.
- [15] The Respondent argues that an OCF-10 was requested because of the ambiguity in the disability certificate, and, as no OCF-10 was submitted, the Applicant must be barred from proceeding. The respondent relies on several Tribunal decisions in support of its position. The Respondent is also requesting costs in the amount of \$1,000, essentially because the Applicant refused to withdraw the NEB claim.

- [16] The Applicant submits that he was not required to submit an OCF-10. First, he argues section 35 does not come into play and is not triggered because he did not elect an IRB; he is only seeking a NEB. Second, he argues that section 12(3) lists conditions under which an insurer is not required to pay a NEB, and none of those subsections refer to the mandatory submission of an OCF-10 as a pre-condition for non-payment. He provided Tribunal decisions in support of his position². Third, he argues that he did not receive the Respondent's notices of June 10 or 14, 2019, as they were not sent to his counsel, as he had instructed the Respondent.
- [17] I disagree with the Applicant. Section 35 of the *Schedule* is clear and mandatory. It requires an insurer to notify the insured person of the requirement to elect the benefit the insured wishes to receive when the information provided indicates entitlement to two or more specified benefits. In other words, where an application indicates possible entitlement to more than one specified benefit, in addition to an OCF-1 and an OCF-3, an OCF-10 is required.
- [18] Further, the Applicant's reliance on section 12(3) overlooks other relevant benefits of the *Schedule* affected by a section 35 election. Specifically, section 5(2) disentitles an insured person from receiving an IRB if they elected to receive a NEB or a caregiver benefit, while section 13(3) similarly disentitles an insured from receiving a caregiver benefit if they elected to receive an IRB or NEB. The *Schedule* accordingly disallows an insured from receiving more than one of an IRB, NEB, or caregiver benefit; however, to determine which two benefits the insured is legally precluded from receiving, the insured must elect the third benefit.
- [19] In this case, information in the OCF-3 indicated that the Applicant had met the disability tests for both an IRB and a NEB. To address this ambiguity the Respondent sent the Applicant two notices requesting an OCF-10. Again, the first notice of June 10, 2019, which denied both benefits, asked the Applicant to submit an OCF-10 pursuant to section 33 if he wished to pursue an IRB or NEB. The second notice of June 14, 2019 also asked the Applicant to submit an OCF-10.
- [20] On the evidence, I find the Applicant is barred from proceeding with his claim on two bases. First, because he failed to submit an OCF-10 requested under section 33. Here the Applicant was required to provide information reasonably required to determine his entitlement to a benefit, and by necessary implication,

² JG v Co-operators General Insurance Company, 2019 CarswellOnt 19118 and MK v TD General Insurance Company, 2020, CarswellOnt 15413.

disentitlement to the other two benefits. With the Applicant failing to provide the OCF-10, section 33(6) relieved the Respondent from paying the NEB.

- [21] Second, on the basis that the application is incomplete because the Applicant failed to submit an OCF-10, as required under section 35(1). With an incomplete application, the Respondent's obligations are not engaged, including the obligation to pay under section 12.
- [22] Of the caselaw provided by the Respondent, the following are particularly persuasive and share similar facts with the case at hand: *JB v Allstate Insurance Company of Canada*, 2021 and *RG v Travelers Insurance*, 2021 CanLII 108368 (ON LAT). The decisions the Applicant provided are distinguishable on the facts and are of no assistance.
- [23] As to whether the notices were sent to the Applicant, I note on the evidence that both notices were sent to him by mail. This is in accordance with section 64 of the *Schedule*. Accordingly, I find that the Applicant was properly notified that he was required to submit an OCF-10. Also, contrary to his submissions, the notice of June 10, 2019 was copied to his counsel.
- [24] Turning to the claim for costs, the Respondent argues it is entitled to it because the Applicant should have withdrawn the NEB claim in the absence of an OCF-10. The Applicant disagrees and maintains that he is entitled to pursue his claim.
- [25] The request for costs is dismissed. Costs are a discretionary remedy and may be awarded when a party has acted unreasonably, frivolously, vexatiously, or in bad faith, pursuant to Rule 19.1 of the Tribunal Common Rules of Practice & Procedure. I have considered the parties' submissions and do not find that the Applicant's conduct in pursuing his NEB claim met the threshold for costs.

[26] Lastly, given my finding that the Applicant cannot proceed with the NEB claim, a hearing on the remaining issues in the application may proceed in writing. The Tribunal will contact the parties to schedule a written hearing in due course.

Released: September 15, 2022

A handwritten signature in black ink, appearing to read 'S. Makhamra', is positioned above a horizontal line.

Samia Makhamra
Adjudicator