



Citation: Hu v. Aviva General Insurance Company, 2023 ONLAT 21-011082/AABS - PI

Licence Appeal Tribunal File Number: 21-011082/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:

Ji Xian Hu

Applicant

and

Aviva General Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: Tavlin Kaur

APPEARANCES:

For the Applicant:

Ji Xian Hu, Applicant
Michael L. Bennett, Counsel
Alice Xiao, Counsel

For the Respondent:

Kevin So, Counsel

Heard by way of written submissions

OVERVIEW

- [1] Ji Xian Hu, the applicant, was involved in an automobile accident on December 19, 2018, and sought benefits pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, Aviva Insurance Company of Canada (“Aviva”) and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE

- [2] The preliminary issue to be decided is whether the applicant is statute-barred from proceeding with his claim for income replacement benefits (IRBs) as he failed to submit a Disability Certificate (OCF-3) within the times prescribed by the *Schedule*?

RESULT

- [3] I find that the applicant is statute-barred from proceeding with his application.

ANALYSIS

Background

- [4] I find that the applicant did not submit a completed OCF-3 within the timeframe set out in section 32(5) of the *Schedule* and is therefore not entitled to proceed with his claim for the IRB.
- [5] On January 8, 2019, after the applicant provided notice of the accident, the respondent sent the applicant the standard accident benefits package and advised the applicant that it required the Application for Accident Benefits (“OCF-1”), Employer’s Confirmation Form (“OCF-2”) and the Disability Certificate (“OCF-3”) forms to be completed in order to determine entitlement to the IRB.
- [6] The OCF-1 was submitted on October 2, 2019. On October 7, 2019, the respondent acknowledged receipt of the OCF-1 and informed the applicant that it required the OCF-3.
- [7] The OCF-3 dated March 5, 2021 was not submitted by C.E.S. Physiotherapy and Rehabilitation until April 6, 2021.
- [8] The applicant submits that pursuant to Ontario Regulation 73/20 (“O. Reg 73/20”) any limitation period that started running before March 16, 2020 should be

extended by exactly 26 weeks. A 26-week extension would extend the 104-week limitation period from December 19, 2020 to June 19, 2021. As such, the applicant's position is that he submitted his OCF-3 within the timeframe.

- [9] The respondent submits that O. Reg. 73/20 does not automatically apply to extend a limitation period in statutory accident benefits disputes. Nor has the applicant provided any previous decisions in support of his position. Moreover, O. Reg. 73/20 applies to limitation periods to commence "proceedings" and does not address timelines pertaining to procedural requirements that do not relate to the commencement of proceedings.

Ontario Regulation 73/20

- [10] On March 20, 2020, Ontario enacted O. Reg. 73/20. This Regulation suspended limitation periods retroactively from March 16, 2020. The Regulation was revoked on September 14, 2020. This legislation was in force for 183 days. As such, under the Regulation, a limitation period that was running between March 16, 2020 and September 14, 2020 could be extended by 183 days. I note that this was affirmed in *McAuley v Canada Post Corporation*, 2021 ONSC 4528, where the Ontario Superior Court of Justice found that O. Reg. 73/20 extended all running limitation periods by 183 days.

What is the limitation period?

- [11] Throughout his submissions, the applicant references the "104-week limitation period". Based on the facts and evidence before me, I find the applicant conflates the two-year limitation period for challenging a denial of an accident benefits claim under section 56 of the *Schedule* with the 104-week period for which an applicant may be entitled to an IRB and the submission of an OCF-3 for the purposes of making an accident benefits claim under section 32.
- [12] First, section 32(5) requires that an applicant submit a completed and signed application for benefits to the insurer within 30 days after receiving the application forms. Second, section 36(2) states that an applicant seeking IRBs shall submit a completed disability certificate with their application. There is nothing in the *Schedule* that specifically states that an insured person must apply for an IRB within 104 weeks of the accident. Rather, section 5 of the *Schedule* only dictates that an insured person suffers a substantial inability to perform the essential tasks of that employment within 104 weeks. Third, pursuant to section 56, following the denial of an accident benefits claim by their insurer, an applicant must submit an application to the Tribunal for resolution of the dispute within the two-year limitation period.

[13] Accordingly, in my view, the applicant has identified the wrong limitation period, as the two-year limitation period under section 56 pertains to an application to the Tribunal to dispute a denial and/or his eligibility for an IRB, not the amount of time he has to submit an OCF-3 to complete his claim for an IRB, which is governed by section 36(2). I find that the correct limitation period to submit the OCF-3 along with the OCF-1 remained 30 days after receiving the application forms from the respondent, as provided by section 32.

Does O. Reg 73/20 apply to section 32(2) of the Schedule

[14] Pursuant to section 1 of O. Reg. 73/20, “any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended, and the suspension shall be retroactive to Monday, March 16, 2020.”

[15] For example, if an applicant had received the complete application package on February 18, 2020, they would have up to March 19, 2020 to submit the OCF-1, OCF-2 and OCF-3 in normal circumstances. However, due to the pandemic, the limitation period would be extended by 183 days as per O. Reg. 73/20.

[16] However, on the facts before me, I find that O. Reg. 73/20 does not apply to the applicant’s case. The respondent provided the applicant with the OCF-1, OCF-2 and OCF-3 on January 8, 2019, over 14 months before the pandemic began. There is no suggestion that there was a delay in receiving this package from the respondent. In fact, based on the adjuster’s log notes, the package was sent to the applicant’s email address. Pursuant to section 32, the applicant therefore had 30 days after receiving the application package on January 8, 2019 to submit both the OCF-1 and OCF-3 to the respondent, meaning the completed package was due back to the respondent in February 2019, which is still 13 months prior to the onset of the pandemic. Therefore, I find that the limitation period to submit a completed and signed application for benefits started and ended well before O. Reg. 73/20 came into effect. As such, the applicant cannot rely on O. Reg. 73/20 to extend the limitation period.

[17] In any event, I note that the applicant did not submit his OCF-1 until October 2, 2019 and that the respondent did not take issue with the late submission. In fact, the respondent gave the applicant another opportunity to submit the OCF-3. However, the applicant still did not submit it until April 6, 2021, or nearly 15 months after receiving the accident benefits package from the respondent. I find the submission of the OCF-3 to be well outside of the 30-day limitation period. The OCF-3 should have been submitted with the OCF-1, as this is dictated by sections 32(5) and 36(2).

[18] The applicant has not made pinpoint references to sections in the *Schedule* that support his case. Nor has he provided any jurisprudence on this point. As such, I find that O. Reg 73/20 does not apply and therefore the limitation period cannot be extended as a result.

The applicant did not provide a reasonable explanation for the delay

[19] Section 34 of the *Schedule* states that “a person’s failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation.” While neither party raised this case, the Tribunal’s interpretation of a “reasonable explanation” is guided by *Horvath and Allstate Insurance Company of Canada*, FSCO A02-000482, June 9, 2003, and was more recently reiterated in *K.H. vs Northbridge*, 2019 CanLII 101613 (ON LAT). The guiding principles are summarized as follows:

1. An explanation must be determined to be credible or worthy of belief before its reasonableness can be assessed.
2. The onus is on the insured person to establish a “reasonable explanation.”
3. Ignorance of the law alone is not a “reasonable explanation.”
4. The test for “reasonable explanation” is both a subjective and objective test that should take account of both personal characteristics and a “reasonable person” standard.
5. The lack of prejudice to the insurer does not make an explanation automatically reasonable.
6. An assessment of reasonableness includes a balancing of prejudice to the insurer, hardship to the claimant and whether it is equitable to relieve against the consequences of the failure to comply with the time limit.

[20] I must first determine whether the explanation is credible or worthy of belief. The applicant submits that if it was not for the pandemic and multiple lockdown measures, he would have seen his family doctor and filled out an OCF-3 by December 19, 2020. Due to the various logistical challenges brought on by the pandemic, he could not submit his OCF-3 until April 6, 2021.

[21] I am not persuaded by this explanation because it is not credible or worthy of belief. The pandemic was not a live issue in 2019. There were no lockdowns at

the time. His explanation falls short in terms of explaining the delay that took place in submitting the OCF-3 prior to the beginning of the pandemic. Moreover, the applicant did not submit an affidavit to support his explanation. Submissions are not evidence.

- [22] The applicant submits that “it is important to consider the overarching principles in interpreting the *Schedule* when considering barring an applicant’s entitlement based on a technical statutory requirement”. The applicant provided excerpts from various cases but did not provide submissions as to how these principles relieve him from the duty to comply with the requirements set out in the *Schedule*. Although not binding, I am persuaded by the reasoning in *J.V. v. TD Insurance Meloche Monnex* (“*J.V.*”), 2019 CanLII 110091 (ON LAT) where the adjudicator stated:

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.”

- [23] While I agree that the *Schedule* is consumer protection legislation, it is the applicant’s responsibility to comply with the procedural requirements for making an accident benefits claim. In my view, the applicant did not comply with the timelines set out in sections 32 and 36 of the *Schedule* nor did he provide a reasonable explanation under section 34.

Issues around productions

- [24] The applicant submits that the respondent has not produced the complete adjuster’s log notes despite being ordered to do so at the case conference. I have reviewed the case conference report and order and note that the disclosure of the adjuster’s log notes pertains to the substantive issue hearing, not the preliminary issue hearing. This issue is not appropriately before me. As such, I am declining to make a determination on this point.

Distinguishing facts section

- [25] The applicant provided a chart where he addressed the case law that was submitted by the respondent in the motion materials in support of its case regarding an incomplete OCF-3. I do not find this chart to be of assistance. The applicant briefly noted differences between the applicant’s case and respondent’s

cases but does not articulate why I should not rely on the case law that the respondent has submitted.

- [26] The applicant also briefly mentioned that the respondent provided boilerplate requests for the OCF-3. The applicant did not make any further submissions on this point. It is unclear what the applicant is trying to argue. The applicant failed to explain what the implications of a boilerplate requests for the OCF-3 are and why that is something that the Tribunal should take into consideration. There was no case law submitted on this point. Nor did he submit the requests for the OCF-3 into evidence. As such, I cannot make a finding on this point.

Relief from forfeiture

- [27] The applicant submits that relief from forfeiture may be at issue. The applicant did not clearly articulate this argument and relied on *J.V. v. TD Insurance Meloche Monnex* (“J.V.”), 2019 CanLII 110091 (ON LAT) which does not support his position.
- [28] The respondent submits that the Tribunal does not have the jurisdiction to grant equitable relief pursuant to section 129 of the *Insurance Act, R.S.O. 1990* (the “Act”). The respondent relies on *Dooley v Aviva General Insurance* (“Dooley”), 2021 CanLII 111189 (ON LAT), *V.A.D. v Intact Insurance Company* (“V.A.D.”), 2020 CanLII 47710 (ON LAT) and *Harsanyi v. The Co-operators General Insurance Company* (“Harsanyi”), 2021 CanLII 35592 (ON LAT).
- [29] I am persuaded by the respondent’s position. Section 129 of 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.

- [30] I do not find that section 129 of the *Act* is available for me to use as an adjudicator at the Tribunal. Section 129 uses the word “court”. The Tribunal is not a court. I interpret this to mean that the legislature did not intend for section 129 to be available to the Tribunal as court is explicitly noted while Tribunal is not. It should also be noted that the Tribunal in *J.V.* was unsure as to whether section 129 confers jurisdiction on the Tribunal to grant equitable relief in the context of claims application requirements prescribed by the *Schedule*.

[31] Moreover, I am persuaded by the Tribunal's decision in *Dooley* where it was found that the limitations under section 122 of the *Act* must also be considered and read in conjunction with section 280(4) of the *Act*. Section 122 establishes the following restriction in relation to specific forms of insurance that are not subject to the "Part" of the *Act* that includes section 129 [emphasis added]:

Except where otherwise provided and where not inconsistent with other provisions of this Act, this Part applies to every contract of insurance made in Ontario, **other than contracts of,**

- (a) accident and sickness insurance;
- (b) life insurance; and
- (c) marine insurance.

[32] Section 280(4) states that "the dispute shall be resolved in accordance with the *Statutory Accident Benefits Schedule*." As in paragraph 23 in *Dooley*, by granting the Tribunal exclusive jurisdiction over accident benefit disputes under section 280(2), and then stating that these disputes must be "resolved in accordance with" the *Schedule* through section 280(4), I agree that section 129 is "inconsistent" with these provisions. As such, I am not satisfied that section 129 applies to accident benefits disputes before the Tribunal.

ORDER

[33] The applicant is statute-barred from proceeding with his application before the Tribunal under section 55 because he did not comply with the timelines in sections 32(5) and 36(2).

Released: April 26, 2023



Tavlin Kaur
Adjudicator