Citation: Ho v. Allstate Insurance, 2023 ONLAT 20-014086/AABS-PI
Licence Appeal Tribunal File Number: 20-014086/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:

Thanh Ho

Applicant

and

Allstate Insurance

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Tavlin Kaur**

APPEARANCES:

For the Applicant: Kevin Doan, Counsel

For the Respondent: Jennifer Griffiths, Counsel

Heard by way of written submissions

OVERVIEW

[1] Thanh Ho, the applicant, was involved in an automobile accident on December 19, 2000, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*. The applicant was denied benefits by the respondent, Allstate Insurance Company ("Allstate"), and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUES IN DISPUTE

[2] The preliminary issues in dispute as listed in the Case Conference Report and Order are as follows:

a) Is the applicant barred from proceeding to a hearing:

i. By virtue of having previously settled a claim arising from this accident on a full and final basis?; or

ii. Pursuant to limitations in the *Schedule*?

[3] The questions before the Tribunal are very narrow. However, it should be noted that the parties have addressed other issues in their submissions, which are issues that are not properly before the Tribunal. If other issues are to be added, parties must follow the appropriate procedure, such as filing a motion to add additional issues. That has not been done in this case. As such, the Tribunal will not consider any additional issues.

RESULT

[4] The applicant is barred from proceeding with his application as there is a binding settlement that he did not rescind within two business days.

ANALYSIS

Background

[5] This proceeding has a very lengthy history. The parties previously appeared before the Financial Services Commission of Ontario ("FSCO"). Following the accident, the respondent started to administer the applicant's claim. There were disputes regarding his entitlement to certain benefits. The parties went for mediation at the FSCO in 2002. The mediation failed. The applicant then applied for arbitration before the FSCO on November 4, 2002. The respondent filed a response on December 19, 2002 and confirmed its refusal to pay the benefits in dispute.

[6] On April 14, 2003, a pre-hearing discussion was held at FSCO, and the matter was set down for a hearing. A settlement discussion was scheduled prior to

the hearing on September 29, 2003. The parties met with Arbitrator David Evans and settled the matter after a four-and-a-half-hour discussion. On September 30, 2003, Arbitrator Evans wrote to the parties confirming the settlement. However, the settlement agreement was not completed for reasons unknown. The applicant discharged his lawyer and decided to represent himself.

[7] The hearing was rescheduled for the following year. The respondent's counsel at the time requested a further resumption of the pre-hearing because he was concerned about the applicant's state of preparedness. The resumption was conducted on February 4, 2003 by Arbitrator Sandomrisky, who directed that a settlement arbitrator would be made available at the outset of the first day of the hearing, on February 9, 2003.

[8] On February 9, 2003, the parties engaged in a further four-hour settlement in the presence of Arbitrator Lawrence Blackman, who reported internally in an email that the matter had settled subject to "one loose end" being resolved between the parties. On March 5, 2004, the respondent's counsel wrote to the FSCO requesting assistance with finalizing the settlement that had been agreed upon. Arbitrator Blackman agreed to assist. On May 17, 2004, the applicant, respondent and the applicant's wife were present. The applicant's wife acted as the translator and witness. The matter settled. On May 17, 2004, the release, Settlement Disclosure Notice ("SDN"), Minutes of Settlement, and Consent to the dismissal of the arbitration were completed.

[9] On May 18, 2004, Arbitrator Blackman reported that the file had settled subject to compliance with sections 9.1 and 9.2 of Ontario Regulation 664 and that the FSCO would be closing its file in 20 days on the basis of the settlement. The applicant was provided with copies of the SDN, release, draft order, consent and minutes of settlement, as executed. On the same day, respondent's counsel wrote to the FSCO and provided copies of these documents. He requested that a dismissal order be issued.

[10] On November 19, 2004, the respondent's counsel wrote to the FSCO regarding the dismissal order. There was an oversight on his part. The applicant had not been directed to sign the acknowledgment on page 6 of the SDN, and it is alleged that the respondent was unable to obtain the applicant's signature despite numerous attempts.

[11] On February 17, 2005, the FSCO wrote to the applicant to advise him that they would be closing their file. The letter noted that the matter settled on May 17, 2004 and that the file was closed on June 17, 2004.

[12] The applicant retained new counsel a few years later. On March 6, 2012, the applicant's new counsel notified the respondent that the applicant would be seeking mediation for the income replacement benefit and housekeeping

benefits. However, on February 27, 2013, the applicant withdrew the mediation notice as the matter had been previously settled.

[13] On March 28, 2019, the applicant's current lawyer notified the respondent and the FSCO that he wished to reopen the arbitration hearing. He returned the funds to the respondent. On June 10, 2020, the FSCO ordered that the applicant was precluded from proceeding to arbitration before the FSCO because his application has been extinguished through the operation of section 22(2) of Regulation 664. The parties were informed that they may apply to the Tribunal for a determination of this matter. On November 28, 2020, the applicant filed his application with the Tribunal.

The parties' positions

[14] The respondent submits that there was a clear "meeting of the minds" and a binding agreement to resolve the applicant's claims, which was in compliance with section 9.1 of Regulation 664. The parties conducted themselves in accordance with that agreement for a period of approximately 15 years. The applicant's medical, rehabilitation and housekeeping coverages expired 10 years and 2 years post-accident, respectively.

[15] It is the respondent's position that there is no basis in law for the applicant to rescind the agreement. He has not given the respondent notice of any claims he may wish to advance at this time, as required pursuant to Part VIII of the *Schedule*. He is therefore barred from proceeding with any "new claims" arising after the date of settlement. As all of the denials giving rise to the initial FSCO arbitration (2002-2004) were given more than 18 years prior to this proceeding, he is out of time to advance those claims even if he is entitled to rescind his settlement.

[16] The applicant submits that he is not barred from proceeding to a hearing. The SDN is not compliant. If it is found to be compliant, then any bright-line boundary called for by the Supreme Court of Canada in *Smith v. Co-Operators,* 2002 SCC 30 to protect the consumer would be overruled. In terms of the limitation issue, the applicant submits that he did inform the respondent by submitting an executed application form under a cover letter dated January 8, 2001. It is his position that he has met any two-year limitation period under the *Schedule*.

[17] In the alternative, the applicant submits the two-year limitation period did not start to run because the respondent did not comply with the notice provision under section 49 of the *Schedule*. In the further alternative, the applicant asserts that the current proceeding before the Tribunal is authorized by an order of the FSCO, dated June 10, 2020, where Arbitrator Lee ordered that either party may reapply for a determination of this matter pursuant to section 22(2) of the Regulation. He submits that the transition to the Tribunal from the

FSCO should not permit the respondent to generate a new two-year limitation issue out of a transfer of forum where there had been none.

The applicant has the onus to prove that the settlement is invalid

[18] The applicant submits that the legal onus of proving compliance with section 9.1(3) should rest on the insurer because the insurer and the insurance industry have expertise, resources, and practical access to regulatory bodies including the Superintendent to, among other things, develop an SDN form that is compliant with section 9.1(3). Furthermore, placing the onus on the consumer is not only inconsistent with the consumer protection goals of the legislation, but it would also encourage and reward irresponsible conduct on the part of insurers, such as inordinate delays and other obstinate or tactical obstructions, as shown in this case.

[19] The respondent submits that where one party is seeking to rescind an agreement that they willingly entered into, it is fair and reasonable to put the onus on that party to establish that they have a legal right to rescind. That principle is further supported by the observation that there are logistical challenges and real prejudice faced by a responding party where file contents have been disposed of, and where the opportunity to conduct a "real time" investigation into the claim is lost.

[20] As noted in *Pope v Aviva General Insurance*, 2023 CanLII 19910 (ON LAT) ("*Pope*"), the burden of proof is on the applicant because they seek to be excused from being bound from the settlement that they entered into, on the grounds that the settlement is invalid. Therefore, I find that the applicant bears the onus to prove that the settlement is invalid due to non-compliance with Regulation 664.

Regulation 664

[21] Regulation 664 provides a framework for agreements that finally dispose of a claim or dispute in respect of a person's entitlement to statutory accident benefits under the *Schedule*.

[22] Sections 9.1(2) and 9.1(3) require that a settlement notice be in writing, signed by the insurer, and prescribes the following content of a notice:

1. The insurer's offer with respect to settlement;

2. A description of the benefits that may be available to an insured person under the *Schedule*;

3. A statement that the insured person may rescind the settlement within two business days of the later of signing the disclosure notice and the release, by delivering a written notice to the office of the insurer or its

representative and returning any money received by the insured person in the settlement;

4. A description of the consequences of the settlement of the benefits described in paragraph 2 including,

   i. a statement of restrictions contained in the settlement on the insured person's right mediate, litigate, arbitrate, appeal or apply to vary an order under section 280 to 284, and

   ii. a statement that the tax implications of the settlement may be different from the tax implications of the benefits described under paragraph 2.

5. A statement advising the insured person to consider seeking independent legal, financial and medical advice before entering into the settlement; and

6. A statement for signature by the insured person acknowledging that he or she has read the settlement disclosure notice and considered seeking the professional advice set out in paragraph 5.

[23] Section 9.1(4) states that an insured person is permitted to rescind a settlement within two business days after the insured person signs the disclosure notice and the release, whichever is later. However, section 9.1(5) states that this two-business-day period does not apply if the insurer failed to comply with the prescribed requirements in the SDN.

[24] Section 9.1(7) states that the insured person can rescind a settlement by delivering a written notice to the office of the insurer or its representative and by returning any money received by the insured as consideration of the settlement.

[25] Section 9.1(8) states that no person can apply to the Tribunal under section 280(2) of the *Insurance Act* for any benefits that were the subject of a settlement unless the person has returned the money received as consideration for the settlement.

There was a binding settlement

[26] As noted in *Olivieri v. Sherman*, 2007 ONCA 491 (CanLII), a settlement agreement is a contract. Thus, it is subject to the general law of contract regarding offer and acceptance. For a concluded contract to exist, the court must find that the parties: (1) had a mutual intention to create a legally binding contract; and (2) reached agreement on all of the essential terms of the settlement.

[27] I have reviewed the evidence before the Tribunal and find that there was a mutual intention to create a legally binding contract and that the parties reached an agreement on all of the essential terms of the settlement. The parties attended multiple mediations from 2003 to 2004. The settlement was reached with the assistance of a mediator at the FSCO. The release, SDN, Minutes of Settlement and Consent to the dismissal of the arbitration were executed on May 17, 2004. The FSCO also noted that the matter had settled and closed their file. Therefore, I find that there was a contract between the parties.

Does the applicant's failure to sign the acknowledgment nullify the contract?

[28] The applicant submits that in the SDN, there has to be a statement for the signature to acknowledge that the insured has read the disclosure notice and considered seeking independent legal, financial and medical advice before entering into the contract as per section 9.1(3)6. The applicant states that, "if the insured's signature is not required to be affixed to the designated space, as to leave the approved space blank, this must be held to be a failure to comply with the requirement of section 9.1(3)6. To hold otherwise would effectively repeal or revoke the new additional legislated requirement, a power that is beyond the jurisdiction of the Tribunal and the Courts." It is his position that the SDN is not compliant because the acknowledgment area remains blank and there is no signature or date of the signature.

[29] The respondent submits that the applicant did in fact sign the SDN, albeit not above the acknowledgement line at page 6, which states: "I acknowledge that I have received and read the above Settlement Disclosure Notice provided to me by an insurer, and have considered whether or not to obtain legal, financial and medical advice." The applicant and witness initialled each page of the SDN including page 6, which triggered the two-day cooling off period to rescind the settlement that had been entered into on May 17, 2004.

[30] In the alternative, the respondent submits that the applicant should be deemed to have signed the SDN where it is clear that the disclosure was provided in accordance with the Settlement Regulation, and acknowledged by the applicant in that he initialed each page of the disclosure document in the presence of a witness, and further acknowledged compliance with the Regulation in the Consent and Minutes of Settlement that were signed at the in person settlement meeting before Arbitrator Blackman on May 17, 2007. Moreover, if the Tribunal finds that the SDN is deficient, the respondent submits that there was substantial and meaningful compliance with the Regulation.

[31] On page 6 of the SDN under the insured's acknowledgment section, it states that, "I acknowledge that I have received and read the above Settlement Disclosure Notice provided to me by an insurer, and have considered whether or not to obtain legal, financial and medical advice." The applicant has not

directed the Tribunal to any other deficiencies in the SDN that would render it invalid. In my view, the SDN complies with the requirements under section 9.1(3)6 of Regulation 664.

[32] However, the source of contention in this matter is regarding the lack of a signature on page 6 of the SDN. There is no signature in the space where it says, “signature of the insured” and nor is it dated. However, the bottom right corner has the initial of the applicant as well as the signature of the witness. These are present on each page of the SDN.

[33] Section 9.1(3)6 of the Regulation or any of the other sections do not make any references to where the signature must be affixed. While I acknowledge that the signature is usually found on the space where it says, “signature of the insured”, the applicant has not provided any jurisprudence that supports that the signature must be affixed in that particular place. Nor has he directed the Tribunal to any specific sections in the Regulation that requires the applicant to sign the acknowledgment or what the consequences are for failing to do so. Moreover, the applicant has not articulated why this Tribunal should not accept his initials that were confirmed by a witness at the bottom of the page as a signature.

[34] Furthermore, the settlement was confirmed in the Minutes of Settlement, which was signed and dated by the applicant. It does not state that the settlement was contingent on the personal signing of the acknowledgment on page 6. The applicant’s submissions regarding the Legislature’s intent are speculative and not based in evidence.

[35] I agree with the reasoning in *Estate of K.D.F. v.TD General Insurance Company*, 2022 CanLII 20127 (ON LAT) (“*K.D.F.*”) where the Tribunal held that “where the parties have agreed to a settlement and confirmed same in writing, it constitutes a binding contract. In this case, the SDN and release are mere formalities and are not essential terms of that agreement.” This decision was upheld by the Divisional Court in *TD General Insurance Company v Duff-Foley (Estate*), 2023 ONSC 2400 (CanLII).

[36] The applicant in this case is of the view that the comments in *K.D.F.* regarding the necessity of the signature and SDN are distinguishable because the Tribunal was not dealing with a case of an insured person seeking a statutory remedy under section 279(2) of the *Insurance Act* or section 9.1 of the Regulation. I am not persuaded by the applicant’s submission. The section of the *Insurance Act* that the applicant relies upon is no longer in force or effect. Section 52 of the *Legislation Act*, S.O. 2006, c. 21, Sched. F provides guidance regarding the effect of an amendment and replacement. This section applies if an act is repealed and replaced, a regulation is revoked and replaced or if an act or regulation is amended.

[37] Section 52(3) states that proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible. Section 52(4) states that the procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment. In my view, section 279(2) of the Insurance Act is not applicable. This matter is proceeding under the current version of the Schedule and the remedy he is seeking does not exist.

[38] I find the principles in *K.D.F* to be persuasive and apply them to the facts before me. In my view, I find that there was a binding settlement. The parties agreed to the settlement and confirmed it in writing. There are multiple references to the settlement throughout the evidence tendered by the parties. The SDN and release were not essential terms of the agreement. The applicant has not persuaded me that there was no binding settlement and that the SDN did not comply with the Regulation.

[39] As noted *in Riggs-Estate v. Intact Insurance Company*, 2019 ONSC 6846, "the clear purpose of that legislatively mandated document is to ensure that the insured person fully appreciates the terms of the settlement. In effect, it is a matter of consumer protection." In my view, the fact that the applicant initialled every single page of the SDN suggests that he understood the settlement. Furthermore, he did not take issue with the settlement for many years.

[40] As such, I find the applicant had two business days to rescind the settlement from the time that he settled his claim on May 17, 2004. I find that he did not rescind the settlement within two business days after signing the SDN and release. Therefore, I find he is bound by the terms of the settlement.

Issue #2: Limitations

[41] As I have determined that the applicant is bound by the settlement and precluded from proceeding to the Tribunal because he did not rescind the settlement within two business days, it is unnecessary to consider the issue regarding the limitation period.

ORDER

[42] The application is dismissed.

Released: September 21, 2023

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Tavlin Kaur
Adjudicator