



Citation: Pryciak v. Allstate Insurance, 2023 ONLAT 21-015078/AABS

Licence Appeal Tribunal File Number: 21-015078/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:

Mirosław Pryciak

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR: Michael Beauchesne

APPEARANCES:

For the Applicant: Kateryna Vlada, Counsel

For the Respondent: Jonathan White, Counsel

HEARD: By way of written submission

OVERVIEW

- [1] Mr. Mirosław Pryciak, the applicant, was involved in an automobile accident on August 26, 2020, 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, Allstate Insurance, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
- i. Is the applicant entitled to a non-earner benefit (the “NEB”) of \$185.00 per week from August 26, 2020, to August 26, 2022?
 - ii. Is the applicant entitled to interest on any overdue payment of the NEB.

RESULT

- [3] The applicant is not entitled to an NEB, and, as such, no interest is payable.

ANALYSIS

The applicant’s OCF-3 was submitted too late to be eligible for an NEB

- [4] I find the applicant is not entitled to receive an NEB.
- [5] Section 36(2) of the *Schedule* requires the applicant to submit a completed OCF-3 to the respondent when claiming an NEB. The consequences of not doing so are found in section 36(3) of the *Schedule*, which indicates the applicant is not entitled to an NEB for any period before the OCF-3 is submitted. Section 12(1) of the *Schedule* establishes 104 weeks from the date of loss as the claim period for an NEB.
- [6] The applicant has the onus to prove, on a balance of probabilities, that he submitted an OCF-3 to the respondent.
- [7] The respondent says it sent the applicant a letter, dated October 20, 2022, that acknowledged receipt of an Application for Accident Benefits (the “OCF-1”) from the applicant. That letter noted the applicant may qualify for an NEB, and that in order to apply for this benefit, the applicant must submit an OCF-3 per section 36 of the *Schedule*. The respondent added that the *Schedule* requires it to receive a completed OCF-3 to make a determination of eligibility for the NEB. The

parties do not dispute any of this, and the respondent provided a copy of this letter as evidence.

- [8] The OCF-3 was completed on March 23, 2021, by Dr. Elton Schebesch (chiropractor), who found the applicant suffered a complete inability to carry on a normal life. The applicant says the OCF-3 was submitted to the respondent via fax on the same day it was completed. The respondent denies receiving it on March 23, 2021, or any date thereafter up to June 7, 2023, when the applicant provided a copy of the OCF-3 with its initial submissions for the written hearing.
- [9] The applicant did not provide any compelling evidence in its initial submission to establish the OCF-3 was sent to the respondent on March 23, 2021. In his reply submission, however, the applicant introduced new evidence, consisting of two emails and an excerpt from Dr. Schebesch's clinical notes, to prove the OCF-3 had been submitted to the respondent by fax on March 23, 2021. The respondent argues that the applicant provided no evidence—such as a fax transmission report or cover page—to prove the OCF-3 was submitted. The respondent also asserts it would be improper for the applicant to submit any new evidence in reply to prove the OCF-3 was submitted, and objects to any such evidence being offered as prejudicial.
- [10] In my view, the applicant has provided insufficient compelling evidence to convince me the OCF-3 was submitted to the respondent on March 23, 2021, as he alleges. In saying so, I want to be clear my finding considers the evidence provided with the applicant's reply, despite the respondent's objection. Having reviewed this evidence and establishing it did not satisfy me as proof of submission, I did not deem it necessary to address the respondent's claims of prejudice by inviting a sur-reply.
- [11] I turn now to the three documents put forward as evidence by the applicant with his reply submission. The first is an email, dated March 23, 2021, that was sent to "SCLondon" by the applicant's counsel at 11:57 AM. In that email, the applicant's counsel acknowledges receipt of an unspecified document or thing and then asks that this document or thing be sent to the respondent. For clarity, the email reads: "Perfect! Thank you for sending this over. Please produce this to Mr. Pryciak insurance as well (Allstate)." The email also provides contact information for Mr. Guercio, a senior adjuster at Allstate Insurance. I note here that it is not clear what was sent over, nor what was needed to be produced to the respondent. The means by which it was to be sent (i.e., fax) was not specified.

- [12] The second document is an excerpt from Dr. Schebesch's clinical notes that was entered at either 11 AM or 11:45 AM on March 23, 2021. Both these times appear on the document and no explanation was provided for this by the applicant. This entry indicates that "Miro" and Dr. Schebesch filled out the OCF-3 and "sent it off to his insurer and the lawyer for his case." I note here that there is no indication how the OCF-3 was sent (i.e., fax). Further, the identity and contact information of the receiving parties is not specified (i.e., Mr. Guercio).
- [13] The third and final document is an email thread between the respondent's counsel and the applicant's counsel on November 11, 2022. It starts at 12:08 PM and ends at 1:07 PM. In this exchange, the applicant's counsel tells the respondent's counsel she has confirmation (i.e., the excerpt from Dr. Schebesch's notes) that the OCF-3 was sent to the respondent on March 23, 2021, and that fax records of the transmission are no longer available from Dr. Schebesch's clinic. The respondent's counsel requests a copy of the note excerpt, which the applicant's counsel then provides. I note here there is no evidence a copy of the OCF-3 was provided during this email exchange.
- [14] In my view, this evidence is insufficient to establish that the applicant provided the completed OCF-3 to the respondent via fax on March 23, 2021, as alleged. The applicant did not provide any evidence that directly confirms a fax transmission of the OCF-3 to the respondent on March 23, 2021.
- [15] Although I accept the applicant's counsel was asking Dr. Schebesch to send the completed OCF-3 to Mr. Guercio in her March 2021 email, this email was clearly sent after Dr. Schebesch made his entry about sending the OCF-3 to the applicant's "insurer and lawyer." As such, I cannot reasonably conclude that Dr. Schebesch knew the OCF-3 should be sent to Mr. Guercio in particular, or that the OCF-3 was sent via fax as alleged by the applicant. There is no evidence of a response to the email sent to Dr. Schebesch by the applicant's counsel that confirms he did, in fact, transmit the OCF-3 to Mr. Guercio as requested. There is no fax transmission receipt. I can only find that Dr. Schebesch sent the completed OCF-3 by some means to unknown parties he believed to be correct. This does not establish the OCF-3 was sent to the respondent on March 23, 2021, which is what the applicant must prove.
- [16] Given all this, I conclude that the earliest the completed OCF-3 was submitted to the respondent is June 7, 2023, when the applicant provided his initial submissions for the written hearing to the respondent. However, the applicant's claim period is 104 weeks from the date of loss per section 12(1) of the *Schedule*. His accident occurred on August 26, 2020, and his entitlement to the

NEB expires on August 26, 2022, per the 104 weeks prescribed by the *Schedule*. Therefore, the applicant provided his OCF-3 to the respondent about 10 months past the expiry of his claim. I therefore cannot find he is eligible for an NEB because section 36(3) of the *Schedule* indicates the applicant is not entitled to an NEB for any period before the completed OCF-3 is submitted. I was not directed to any authority that persuaded me to consider otherwise.

Interest

[17] There are no benefits payable, therefore no interest is owing.

ORDER

[18] The application is dismissed.

Released: October 20, 2023

A handwritten signature in black ink, appearing to read 'Michael Beauchesne', is written over a circular stamp. The signature is stylized and somewhat cursive.

Michael Beauchesne
Adjudicator