



Citation: Lubin v. Allstate Insurance Company of Canada 2023 ONLAT 23-002619/AABS-PI

Licence Appeal Tribunal File Number: 23-002619/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:

Eloisia Lubin

Applicant

and

Allstate Insurance Company of Canada

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: Ulana Pahuta

APPEARANCES:

For the Applicant: Jordan Palmer, Counsel

For the Respondent: Lauren Kolarek, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Eloisia Lubin, the applicant, was involved in an automobile accident on December 16, 2022 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (the “Schedule”)*. The applicant was denied certain benefits by the respondent, Allstate Insurance Company of Canada, the respondent, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

- [2] The preliminary issue to be decided is whether the applicant is barred from proceeding with her claim for income replacement benefits (“IRBs”), interest and an award, because she has failed to submit an Election of Benefits form (“OCF-10”).

RESULT

- [3] The applicant is barred from proceeding with her claim for IRBs, interest and an award, as a result of her failure to submit an OCF-10.

BACKGROUND

- [4] The applicant initially submitted an Employer’s Confirmation of Income (“OCF-2”) to the respondent on January 19, 2023, prior to submitting an Application for Accident Benefits (“OCF-1”). By way of an Explanation of Benefits (“EOB”) dated January 27, 2023, the respondent confirmed receipt of the OCF-2 but stated that it could not address specified benefits until receipt of an OCF-1.
- [5] On February 16, 2023, the applicant submitted an OCF-1. The OCF-1 indicated that at the time of the accident, the applicant was employed and working as a personal support worker. Under Part 3 of the form, the applicant also indicated that she was unable to return to her normal activities following the accident. By way of EOB dated February 16, 2023, the respondent confirmed receipt of the OCF-1 and requested a completed Disability Certificate (“OCF-3”), noting that no specified benefits are payable until receipt of the completed OCF-3.
- [6] The applicant submitted a completed OCF-3 on March 2, 2023. The OCF-3 indicated that the applicant was both substantially unable to perform the essential tasks of her employment, and suffered a complete inability to carry on a normal life.

- [7] In an EOB dated March 7, 2023, the respondent noted that the applicant's OCF-1 and OCF-3 both indicated that she may be eligible for both IRBs and NEBs. It requested that the applicant complete and submit an Election of Benefits ("OCF-10") within 30 days, as per s. 35 of the *Schedule*. It sent further correspondence on March 22, 2023, April 5, 2023, April 26, 2023 and August 25, 2023 reiterating its request for an OCF-10.
- [8] On March 7, 2023, the applicant filed an application with the Tribunal for IRBs, interest and an award. To date, the applicant has not submitted an OCF-10.

Parties' Positions

- [9] The respondent submits that the applicant should be barred from proceeding with her application pursuant to s. 35(1) of the *Schedule*, due to her failure to submit an OCF-10. It argues that an OCF-10 was requested because there was ambiguity in the OCF-3 and OCF-1, since the applicant had indicated that she meets the test for both NEBs and IRBs. The respondent cites several Tribunal decisions in support of its position.
- [10] The applicant disputes that she was required to submit an OCF-10. She submits that s. 35(1) was not engaged, since it was clear from the documents provided to the respondent (OCF-1, OCF-2 and OCF-3) that she did not qualify for an NEB, as she was working at the time of the accident. As such, there was no ambiguity as to which specified benefit she qualified for. The applicant also cites Tribunal caselaw in support of her claim.

ANALYSIS

- [11] I find that the applicant was required to submit an OCF-10. As she has not done so, the applicant is barred from proceeding with her claim for IRBs.
- [12] Section 35(1) of the *Schedule* requires an applicant to elect the benefit they wish to receive, within 30 days of receiving a Notice of Election. I agree with the decision cited by the respondent, *A.H. v. Aviva Insurance Canada*, 2021 CanLII 64233 (ONLAT), that "the language of s. 35 is mandatory and unambiguous. Failure to complete this step renders an application for a specified benefit incomplete."
- [13] Although the applicant argues that there was no ambiguity in her application, I disagree. In her submissions, the applicant agrees that in determining her entitlement to a specified benefit, her OCF-1, OCF-2 and OCF-3 were to have been considered by the respondent. She argues that the three forms

cumulatively unequivocally indicate that she qualifies for an IRB, not an NEB. However, the applicant's OCF-3 specified that the applicant was substantially unable to perform the essential tasks of her employment and suffered a complete inability to carry on a normal life. The former is the test for an IRB while the latter is the test for an NEB. Section 35(1) clearly requires the insured person's election between an IRB, NEB, or caregiver benefit where an insured person indicates that they may qualify for at least two of these benefits. The election is for the insured person to make, and not for the insurer to make presumptuously.

- [14] I agree with the reasoning in *A.H. v. Aviva* that an Employer's Confirmation Form (OCF-2) does not eliminate ambiguity in a case such as this, where the OCF-3 indicated that the applicant met the disability test for both NEBs and IRBs. Further, in *Ganea v. Travelers Insurance*, 2021 CanLII 108368 (ONLAT), cited by the respondent, the Tribunal rejected the applicant's argument that as the OCF-1 indicated that the applicant was employed and working at the time of the accident, it was "clear" that he was not eligible for an NEB. Rather, it was held that since the OCF-3 indicated that the insured person met the disability tests for both specified benefits, sufficient ambiguity was created, warranting the requested OCF-10. I am persuaded by the decisions cited by the respondent.
- [15] I further find that the decisions cited by the applicant are distinguishable on the facts. Both *J.G. v. Co-operators General Insurance Company*, 2019 CanLII 110087 (ONLAT) and *M.K. v. TD General Insurance Company*, 2020 CanLII 34500 (ONLAT) involve situations where an insurer made a denial or determination of a specified benefit, without requiring an OCF-10. In these cases, the Tribunal found that the insurer was within its rights to make a determination on the eligibility for a specified benefit without an OCF-10. However, I agree with the respondent that these decisions do not state that an OCF-10 is not required, should the insurer require such a determination. Rather, I find that the cases cited by the respondent are more applicable to the matter at hand.
- [16] As such, I find that the respondent's request for an OCF-10 was warranted and that the applicant failed to submit an OCF-10, as required by s. 35(1) of the *Schedule*. I agree with the reasoning in *A.H. v. Aviva* that as the applicant has failed to comply with a request to elect a specified benefit under s. 35, her application for this benefit has not been completed, and the respondent's obligations to pay in accordance with s. 36(4) of the *Schedule* were never triggered.

ORDER

- [17] For the foregoing reasons, I find that the applicant is barred from proceeding with her application for IRBs, interest, and an award, due to her failure to submit an OCF-10. The application is dismissed. The Tribunal will vacate the hearing date.

Released: December 7, 2023

A handwritten signature in black ink, appearing to read "Ulana Pahuta", is written over a horizontal line. A vertical line extends upwards from the end of the signature.

Ulana Pahuta
Adjudicator