Citation: Tchaprazian v. Co-operators General Insurance Company, 2024 ONLAT 22-009704/AABS

Licence Appeal Tribunal File Number: 22-009704/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:

Sarkis Tchaprazian

Applicant

and

Co-operators General Insurance Company

Respondent

DECISION

VICE-CHAIR: **Jeremy A. Roberts**

APPEARANCES:

For the Applicant:	Sarkis Tchaprazian, Applicant (did not attend) Michelle Velvet, Lead Counsel Rajiv Kapoor, Counsel Mohamed Elbassiouni, Counsel
For the Respondent:	Peter Durant, Counsel

Heard by Videoconference: **October 10 to 11, 2023**

OVERVIEW

[1] Sarkis Tchaprazian, the applicant, was involved in an automobile accident on August 9, 2019, 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, Co-operators General Insurance, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant did not attend the hearing. The applicant's representative indicated at the start of the hearing that she had been unable to contact the applicant since September 5, 2023.

PRELIMINARY ISSUES

The applicant's request to adjourn the hearing was denied

[3] I denied the applicant's request to adjourn the hearing.

[4] The applicant's representative brought a motion to adjourn the hearing based on two factors: (1) she was double-booked in another hearing; and (2) she had been unable to reach the applicant since September 5, 2023 (despite attempts to reach him on September 21, 25, 29, and October 2). She argued that the applicant's presence was required to speak to the issues in dispute.

[5] The respondent consented to the request for adjournment because the representative had a scheduling conflict. However, it did not agree that the applicant's non-attendance was a basis for adjournment, given that the applicant had received ample notice of the scheduled hearing.

[6] I denied the adjournment request. The applicant had previously submitted an adjournment request based on his representative's scheduling conflict. This request was denied by the Tribunal on June 28, 2023. Under Rule 16.4 of the Licence Appeal Tribunal Rules (2023), (which apply here based on Rule 16.5 which states that the new rule applies to any adjournment request made orally on or after August 21, 2023) the Tribunal will not consider adjournment requests made for the same reason. With regard to the applicant's non-attendance, the applicant's presence is not required to proceed with a hearing. I am satisfied that the applicant received Notice of the Hearing from the Tribunal on May 26, 2023. The applicant had ample notice of the hearing. I had evidence from both parties,

including medical documentation. I ordered that the hearing proceed in order to ensure a fair and efficient process.

ISSUES

[7] The issues in dispute are:

i. Is the applicant entitled to an income replacement benefit ("IRB") in the amount of $400.00 per week from August 16, 2019 to date and ongoing?

ii. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[8] The applicant is not entitled to the IRB, interest, or an award.

PROCEDURAL ISSUES

Summons request was denied

[9] I denied the applicant's request to summon a witness.

[10] At the start of the hearing, the applicant requested that the adjuster, Ms. Jennifer Phan, be summoned to testify before the Tribunal. The Tribunal had previously denied a request to summons Ms. Phan on September 21, 2023 on the basis that a final witness list had not been produced by the required deadline.

[11] The applicant argued that the Tribunal erred in its previous decision given that they had submitted a final witness list by the deadline which did include Ms. Phan. The respondent argued that the applicant's recourse would have been to submit a second summons request to the Tribunal demonstrating their error prior to the start of the hearing.

[12] I considered the parties' submissions and I agreed with the respondent. The onus is on the applicant to secure a summons. Yet, the applicant failed to submit a second summons request and provide the information that they believe would have altered the Tribunal's decision. I find the applicant had sufficient time to submit a new summons request to the Tribunal. Moreover, given that the hearing had already begun, I found it would be inefficient to stop proceedings in order to summons the witness. Accordingly, the request is denied.

Request to call undisclosed witnesses was denied

[13] I denied the applicant's request to reserve the right to call future unknown witnesses.

[14] I asked the parties to provide a list of anticipated witnesses and a timeline for their expected testimony. The applicant indicated that other than calling an accountant, Nino Gagliardi, he was unable to provide the names of any other witnesses he intended to call but wanted to reserve the right to call further witnesses at a later time during the scheduled three-day hearing. The respondent argued that it would be prejudicial for it not to know which witnesses to prepare for.

[15] I denied the applicant's request. The Case Conference Report and Order encouraged both parties to agree on a timetable for testimony to ensure an efficient hearing. The applicant did not do this. The applicant did not provide the names of anticipated witnesses nor provide information on their availability. To promote an efficient hearing process, I ordered that the hearing would proceed with the applicant's named witness.

Request to allow new evidence was partially granted

[16] I partially granted a request by the applicant to admit new documents into their hearing brief that had not been previously disclosed.

[17] Rule 9.4 of the *Common Rules of Practice and Procedure, Version I (October 2, 2017)* (which apply here because the appeal commenced prior to August 21, 2023) states that if a party fails to comply with any order with respect to disclosure, that party may not rely on the document as evidence without the consent of the Tribunal.

[18] The applicant brought a motion to allow two sets of documents to be considered as evidence that were not disclosed by the production deadline. He argued these documents were received late as a result of being in a third party's control. The documents were received in two batches: (1) the "August 29, 2023 documents"; and (2) the "September 22, 2023 documents". The Case Conference Report and Order ordered that these documents be produced by June 11, 2023 and that any other documents received that the parties intended to rely upon must be disclosed by July 11th, 2023. The applicant asserted it would be prejudiced if these documents, which spoke to the applicant's medical condition and self-employment situation, were not considered (particularly given the applicant's absence).

[19] The respondent argued that while the August 29, 2023 documents had not been filed by the mandated deadline, they were updated medical records which did not prejudice the respondent. However, it argued that the September 22, 2023 documents, which contained income and employment documents related to his job with Skip the Dishes (including tax records, and employment income), did prejudice the respondent as they were directly relevant to the issue in dispute and were received a mere two weeks prior to the start of the hearing, long after the production deadline. These documents were requested in order to help the respondent's accountant complete correct calculations and entitlement determinations but were never received. Moreover, it argued that the applicant failed to demonstrate why these documents could not have been secured by the production deadline, given that many appeared to be items in the applicant's own possession.

[20] I consented to allowing the August 29, 2023 documents to be considered as part of the applicant's submissions. The respondent submitted these documents did not adversely prejudice it, therefore, I found that their late admission would not unfairly force the respondent to respond to new information.

[21] I rejected the request to allow the September 22, 2023 documents into evidence. I found these documents would prejudice the respondent because it would be unfair for it to have to respond to new documents it had not previously considered which were not received anywhere near the disclosure deadline. Moreover, I did not accept the applicant's argument that failure to admit these documents would prejudice the applicant because: (1) he knew about the production deadlines since the Case Conference on May 11, 2023; (2) he failed to meet either the June 11 or July 11 deadlines and provided no reasonable explanation as to why it took four months to produce them; and (3) I see no reason why the documents he mentioned were not in the applicant's own control. I therefore ordered that the September 22, 2023 documents be barred.

Request for a "Right of Reply" was granted

[22] I allowed the applicant a brief right of reply following the closing submissions.

[23] The applicant requested a right of reply, following closing submissions, arguing that evidence had been admitted as exhibits from the respondent's brief as part of the respondent's closing submissions. The respondent argued that it was not common practice to allow a reply during closing submissions, given that closings usually contain only a summation of what has already been heard.

[24] I granted the applicant a brief reply limited only to any submissions on the new exhibits introduced by the respondent. Due to the brevity of the hearing (we only heard from one witness), I allowed both parties the opportunity to enter new exhibits as part of their closings. Given this, it was procedurally fair for the applicant to be given an opportunity for a brief reply addressing only the new evidence tendered by the respondent.

ANALYSIS

Background

[25] Rather than make a substantive case on entitlement to IRB, the applicant argued that the dispute on IRB entitlement is a procedural one which turns on whether the applicant properly responded to a request for further information under s.36(4)(c) of the *Schedule*.

[26] Section 36(4) of the *Schedule* obligates the insurer to take one of three actions within 10 days of receiving a completed OCF-3. The insurer must: (a) pay the specified benefit; (b) give the applicant a notice explaining the medical and any other reasons why the insurer does not believe the applicant is entitled to the specified benefit; or (c) send a request for more information to the applicant under s. 33(1) or (2).

[27] Failure by the insurance company to comply with s. 36(4) of the *Schedule* triggers s. 36(6), which states that the insurer shall pay the specified benefit for the period starting on the day the insurer received the application and completed OCF-3 and ending on the day the insurer gives a notice described in s.36(4)(b).

[28] Failure by the applicant to comply with a request for further information under s. 36(4)(c) triggers s. 33(6), which states that the insurer is not liable to pay a benefit in respect of any period during which the insured person fails to comply with subsection (1) or (2).

[29] The chain of events is as follows: On September 13, 2019, the applicant submitted a completed disability certificate (OCF-3). The respondent replied on September 23, 2019 (“the letter of September 23, 2023”), and indicated that while the applicant “meets the disability test for the IRB for a period of 9-12 weeks”, the insurer was “unable to determine [the applicant’s] eligibility for benefits under the SABS until we have completed our investigation. We have since requested further information, and upon receipt, we will provide you with an update as to your eligibility for benefits under the SABS”. In subsequent correspondence that day (“the fax of September 23, 2023”), sent only to the

applicant's legal representative, the respondent provided a list of documents it requested.

The applicant is not entitled to an IRB

[30] I find that the applicant is not entitled to an IRB given that the applicant has failed to reasonably respond to a request for further information under s. 36(4)(c) and s. 33(1) of the *Schedule*.

[31] The applicant argues the respondent did not satisfy s. 36(4) of the *Schedule* and the remedy to this failure is that the insurer pay an IRB from September 13, 2019 (the date the OCF-3 was received) to present and ongoing (or until the respondent satisfies s.36(4)(b)). The applicant acknowledges that the letter of September 23, 2023 states that the insurer is "requesting further information", but he argues the specific wording of s. 36(4)(c) was not satisfied because: (1) the list of requested information sent in the fax of September 23, 2023 was sent to the applicant's representative and not directly to the applicant; (2) the respondent failed to satisfy the requirements under s. 64(19) of the *Schedule* which prescribes the proper way to send information via fax (namely that the respondent did not provide a cover letter).

[32] The respondent argues that it satisfied s. 36(4)(c) of the *Schedule* by requesting further information, as outlined in its fax of September 23, 2023. Furthermore, it argues the applicant has not yet satisfied its request for further information, rendering them unable to determine the applicant's eligibility for an IRB.

[33] I agree with the respondent. I find that the fax of September 23, 2023 satisfies the requirements of s. 36(4)(c) as a request for further information. I am satisfied that faxing a document to the applicant's representative is a reasonable means of transmitting information, particularly given the wording of s. 64(2)(a) which states that a document may be delivered "by faxing the document […] to the authorized representative."

[34] I reject the argument that the fax of September 23, 2023 should be disregarded because it lacks a cover letter as provided under s. 64(19). The *Schedule* does not provide a remedy for a failure to adhere to s. 64(19), which leaves it up to the adjudicator's discretion to determine the consequence, if any. In this case, the applicant made no arguments to suggest that he did not receive the fax or that he was at all confused as to the topic or intended audience. The fax lists the applicant's name, policy number, claim number, and date of loss. I am therefore not convinced that the non-adherence to s. 64(19) should make the document

invalid and grant the applicant an IRB on a technicality. I am satisfied that the respondent did request further information pursuant to s.36(4)(c).

[35] Given that I am satisfied that the respondent did request further information pursuant to s. 36(4)(c) and given that the applicant did not prove that he complied with that request, I find that this triggers s. 33(6) of the *Schedule*. An IRB is not payable until the applicant complies with s. 33(1).

Interest

[36] No interest is owed as I find that no benefits are payable.

Award

[37] As the applicant is not entitled to the benefit in dispute, he is not entitled to an award.

ORDER

[38] I order the following:

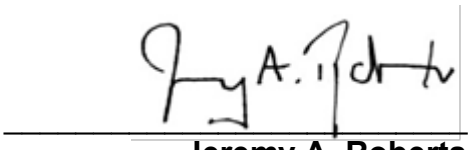
i. The applicant is not entitled to an IRB.

ii. The applicant is not entitled to interest.

iii. The applicant is not entitled to an award.

iv. The application is dismissed.

Released: January 5, 2024



Jeremy A. Roberts
Vice-Chair