

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

**Citation: K.H. vs. Northbridge General Insurance Company, 2019 ONLAT 18-
009282/AABS**

Tribunal File Number: 18-009282/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8, in relation to statutory accident benefits.

Between:

K.H.

Applicant

and

Northbridge General Insurance Company

Respondent

AMENDED, AMENDED DECISION

ADJUDICATOR: Craig Mazerolle

APPEARANCES:

For the Applicant: Natalie Gerry, Counsel

For the Respondent: Rebecca Brown, Counsel

Hearing Heard: In-Person: June 17-18 and July 25, 2019

OVERVIEW

- [1] While driving to pick up some donations for her daughter's judo tournament on February 26, 2016, the applicant was involved in an automobile accident. To assist in her recovery, the applicant attempted to access benefits pursuant to the *Statutory Accident Benefits Schedule*¹ (the "Schedule"). The respondent denied these benefits on the basis of her lengthy delay in applying for them.
- [2] It is an uncontested fact that the respondent did not receive notice of this accident until February 22, 2018, i.e., well beyond the 7- and 30-day timeframes required in sections 32(1) and (5) of the *Schedule*, respectively.
- [3] The respondent is, therefore, asking the Tribunal to find that the applicant is disentitled from accident benefits due to the late submission of this information. Further, though s. 34 of the *Schedule* may still allow an insured person to access benefits if there is a "reasonable explanation" for a delay, the respondent contends that there is no such explanation.
- [4] For the following reasons, I find that the applicant does not have a reasonable explanation for her failure to comply with sections 32(1) or (5). Therefore, she is not entitled to pursue accident benefits under the *Schedule*.

INCLUSION OF DR. SUZANNE CHOMYCZ

- [5] At the start of the hearing, the respondent informed the Tribunal that it took issue with the inclusion of Dr. Suzanne Chomycz as an expert witness in this proceeding. Specifically, the respondent argued that she could not be an impartial witness because the letter from the applicant's representative requesting this report (the "Referral Letter") contained information and conclusions that appeared to direct her findings. The applicant disputed this claim and, moreover, pointed to how the respondent missed the deadline for contesting an expert's report in the *Common Rules of Practice & Procedure*.² I informed the parties during the hearing that I would allow Dr. Chomycz to participate in the hearing.
- [6] Rule 10.4 of the LAT Rules states that any challenge to an expert's report must be made "as soon as possible and no later than 10 days before the hearing". In this case, the Tribunal was informed of this challenge the day of the hearing, even though the respondent received the Referral Letter and Dr. Chomycz's

¹ Effective September 1, 2010, O. Reg. 34/10.

² *Licence Appeal Tribunal, Animal Care Review Board, Fire Safety Commission (October 2, 2017)* (the "LAT Rules").

report months before. Though the timelines listed in the LAT Rules may be amended to promote a just and efficient hearing process, I was given no explanation why the respondent did not raise its objection in a timely manner. Additionally, the prejudice that the applicant would experience by disregarding this expert evidence was simply too great to dispense with this evidence on a preliminary basis. Rather, any issues with Dr. Chomycz's report and impartiality would be best addressed through cross-examination, closing submissions and, ultimately, weight.

REASONABLE EXPLANATION

- [7] Section 32(1) of the *Schedule* requires an insured person to inform an insurer of an accident within 7 days, at which point the insurer will provide him or her with the application forms for accident benefits. Section 32(5) then requires an insured person to complete and deliver these forms back to the insurer within 30 days. None of these timelines were met by the applicant.
- [8] As such, she is raising the exception in s. 34, which allows an insured person to proceed with a late application for benefits "if the person has a reasonable explanation" for the delay.
- [9] As noted in *S.R. and State Farm Mutual Automobile Insurance Company*:³

Arbitral caselaw dealing with reasonable explanation is well settled. In *Horvath and Allstate Insurance Company of Canada*, (FSCO A02-000482, June 9, 2003), Arbitrator Leitch considered arbitral jurisprudence and identified the following principles concerning the interpretation of "reasonable explanation":

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 of "reasonable explanation" is both a subjective and objective test that should take account of both personal characteristics and a "reasonable person" standard.

³ FSCO A09-002171 (*State Farm*), at p. 5.

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.

[10] The applicant has provided two purported “reasonable explanations”: first, she assumed her legal counsel was handling her accident benefits claim (and that a lawyer was required to file such a claim); and, second, her accident-related, psychological impairments left her unable to apply for benefits.

Psychological Impairment

- [11] The respondent takes issue with the inclusion of the latter explanation, as the applicant’s answers during an examination under oath in April 2018 suggested that the only explanation she was putting forward involved her reliance on counsel. I do not place much weight on this discrepancy, as it is reasonable to assume that the applicant did not fully realize the extent to which her psychological state may have been affecting her behaviour. Regardless, beyond the effects that this psychological condition may have had on her decision to rely so heavily on legal assistance, I do not find her psychological condition to be a standalone “reasonable explanation”.
- [12] When considering the applicant’s ability to engage in similar (if not, significantly more challenging) tasks in the period between the accident and February 22, 2018, this explanation is simply not credible or worthy of belief. For instance, in the months following the accident, the applicant was able to complete an application for Employment Insurance benefits. She did require assistance in completing this application, but even seeking this help demonstrates a level of initiative and follow-through that she claimed to lack during this period.
- [13] What is more, the applicant was able to complete a college diploma following the accident. The applicant testified that this diploma was difficult to complete, and that she ended up taking a truncated program. I fully accept these challenges, but it is simply not credible to say that someone who was able to complete a college diploma was, at the same time, psychologically impaired to the point that she could not complete an application for accident benefits. At most, this psychological distress is one of the “personal characteristics” that must be considered when determining the reasonableness of her other explanation, i.e., reliance on counsel.

Reliance on Counsel

- [14] For the purpose of this hearing, I am prepared to accept the applicant's account of what transpired between her and Pace, i.e., the first law firm she contacted following the accident.
- [15] Shortly after the accident, the applicant and her mother discussed a family member's recent experience with Pace. This conversation (as well as a suggestion from her chiropractor) eventually led to the applicant calling Pace.
- [16] About a week and a half after this call, the applicant received a large package of documents from the law firm. It took her a while to make it through the package, as she became discouraged by the sheer volume of the paperwork. Finally, after much prodding from her family, the applicant completed the forms and sent them back. She may have called the firm shortly after mailing the package to ensure they received it, but, on this point, the applicant was not certain during her testimony.
- [17] Many months passed. The applicant never heard from the law firm. The applicant's mother urged her to check in on the status of the application, but she resisted. Rather, the applicant assumed Pace was handling her claim, and they would contact her when there was an update.
- [18] Finally, in and around October or November 2017, the applicant called Pace to see if they had an update on her file. She eventually received a letter from a lawyer at the firm, Elaine Bright, on December 14, 2017. Ms. Bright explained that the firm would not be proceeding with any claims related to the accident. She also alerted the applicant to the upcoming [emphasis in original] "limitation period which you should assume is **February 26, 2018.**"
- [19] Upon receipt of this letter, the applicant sought out the assistance of a second law firm which eventually referred her to her current legal representative, i.e., Ericksons LLP. Ericksons LLP alerted the respondent of the applicant's accident in a letter dated February 22, 2018. The letter also stated that an application for accident benefits would be forthcoming.
- [20] I accept that this explanation of the delay is, at least, worthy of belief, as the applicant's actions following Ms. Bright's letter lends credence to this explanation. That is, soon after receiving this letter, the applicant took steps to immediately locate new counsel—evidence that she believed she needed a lawyer to file an application for accident benefits.

- [21] Meeting this preliminary threshold, the question I must now answer is whether this explanation, when taking her personal characteristics into account, is objectively reasonable? After considering the parties' submissions and evidence, I do not accept that her account amounts to a reasonable explanation, as no reasonable person would have allowed such a delay to take place.
- [22] In the two years following this accident, the applicant experienced a number of significant life events (e.g., her husband lost his job, she completed a college diploma, the couple had their fourth child, etc.). Therefore, even if one may not have been aware of the reporting requirements under the *Schedule*, a reasonable person would have still known that their lawyer should be aware of any major changes in one's life. Yet, in the present case, the applicant went many months without any follow up with Pace. At the very least, she must have been aware that the information in her application package with the firm had changed, and that a failure to update this information could lead to further delays in Pace managing her claim.
- [23] Additionally, the applicant had several periods following the accident when she required income assistance, so one category of benefits that she intends on pursuing (if granted this exemption) is an income replacement benefit. I highlight this request because, if there is a recognized loss arising from the accident (e.g., an inability to work), I find that a reasonable person would have taken steps to forward this need to the lawyer one assumed was handling the accident claim. Once again, there no evidence to suggest that the applicant tried to follow up with Pace with this concern.
- [24] In a similar vein, the applicant was also aware that she needed funding for counselling services, yet, once again, there was no follow-up with Pace. That is, the applicant was provided with OHIP-funded counselling following the accident. However, after the public insurer stopped funding her initial therapist, the applicant refused to see any of the other service providers that OHIP was still willing to fund. Therefore, even though she suddenly lost the funding she needed to pay for her preferred therapist, the applicant made no attempts to contact Pace to see if the respondent could fund this therapist's services instead.
- [25] I do accept that the applicant's decision-making capabilities were likely hindered by her psychological distress. However, as noted above, I also find that the applicant had the capacity to seek out help to address the challenges she was facing. Therefore, since she had the capacity to request assistance with these other tasks, it does not then follow that she would be unable to contact Pace to

see if they could help her obtain income assistance or counselling services from the respondent.

- [26] As a brief comment about prejudice, the Financial Services Commission of Ontario previously found similar delays to be presumptively prejudicial to an insurer (e.g., in the aforementioned *State Farm*⁴, a delay of 29 months was found to be a “significant delay” and, therefore, presumptively prejudicial). This presumption makes sense, as significant delays prevent an insurer from requesting contemporaneous, medical examinations and records. This lack of information deprives both parties of accurate information about what effects, if any, an accident has had on an insured person. Therefore, in light of the aforementioned life events that took place after the accident, it is now virtually impossible to delineate between the accident’s psychological effects and those arising from these subsequent events.
- [27] This prejudice to the respondent does not outweigh the hardship the applicant will be facing on account of a complete bar on benefits. However, this imbalance does not sway my opinion about the reasonableness of the applicant’s inaction.
- [28] Taken together, I cannot say that a reasonable person—with similar personal circumstances—would have waited as long as the applicant did to follow up with her counsel (and, by extension, to contact her insurer). As such, I do not find that either of the applicant’s explanations are reasonable.

COSTS

- [29] Rule 19.1 of the LAT Rules states that costs may be awarded when “another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith”. In the present matter, the applicant argues that the respondent unnecessarily delayed the proceedings by asking for a continuation of the hearing to allow Ms. Bright to testify. Additionally, the applicant says it was inappropriate for the respondent to claim that she lied.
- [30] I do not accept that either of these allegations amounts to unreasonable, frivolous, vexatious, and/or bad faith behavior on the part of the respondent. Not only was the continuation of the hearing necessary to accommodate Ms. Bright’s availability to testify, but there is nothing inherently unreasonable about a party questioning the testimony of another party’s witness. Taken together, I will not award costs in this proceeding.

CONCLUSION

⁴ *Ibid*, at p. 12.

[31] The applicant does not have a reasonable explanation for her delay in applying for accident benefits. Therefore, the applicant may not proceed with her application for these benefits.

Released: September 19, 2019

**Craig Mazerolle
Adjudicator**