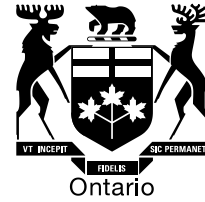


LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards
Tribunals Ontario



Date: **2017/02/03**

Tribunal File Number: **16-000151/AABS**

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

K. T.

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION

Adjudicator: Cynthia Pay

Representatives:

For the Applicant: Lawrence Greenspon, counsel

For the Respondent: Ryan Kirshenblatt, counsel

Held in writing: October 20, 2016

Overview:

1. The applicant was involved in an automobile accident on November 28, 2013 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "Schedule").
2. She submitted an application for dispute resolution services to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") regarding her entitlement to income replacement benefits.
3. The respondent raises a preliminary issue about the applicant's entitlement to income replacement benefits in Ontario. It requests that the Tribunal dismiss her Application.
4. The respondent submits that the applicant is not eligible for income replacement benefits in Ontario because at the time of the accident she was a resident of Quebec. As a Quebec resident she was entitled to and received benefits under the *Quebec Automobile Insurance Act*. The respondent asserts that this is her main or only source of accident benefits. In the alternative, the respondent submits that if the applicant is entitled to also claim accident benefits in Ontario, they are only liable to pay any benefit that is in excess of her Quebec entitlements. As the applicant's Quebec income-related benefits were higher than those the respondent has determined she would be entitled to in Ontario, there are no benefits "in excess". As a result, the respondent submits she is not entitled to income replacement benefits in Ontario.
5. The applicant disagrees, and submits that she is entitled to claim income replacement benefits in Ontario.
6. For the reasons set out below, I find that the applicant is entitled to pursue her claim for income replacement benefits in Ontario.

Issue:

Is the applicant entitled to claim income replacement benefits in Ontario?

Result:

The applicant is entitled to claim income replacement benefits in Ontario.

Background Facts:

7. The parties largely agree on the facts of this case in their submissions and supporting documentation, including the affidavit evidence of Bonnie C. (student-at-law in the office of the Respondent's representative) and Michel D. (legal assistant in

the office of the Applicant's representative). Based on these materials, and the parties' agreement on the facts, I make the following findings of fact.

8. The Applicant was involved in an automobile accident in Ontario on November 28, 2013. She was struck by a car while she was walking. She does not own a car herself. Both her spouse and the driver of the vehicle that hit the applicant had automobile insurance coverage with Allstate, the respondent insurer.
9. On January 6, 2014 the applicant applied for accident benefits from the Quebec Société de l'assurance automobile ("SAAQ"). She was found to be entitled to income loss compensation of \$743.27 every two weeks (\$371.64 per week). These benefits were ongoing until they were terminated as of November 5, 2014. The applicant did not appeal this decision. Details regarding the reasons for termination or why the applicant did not appeal the decision were not before me.
10. On November 20, 2014, the applicant applied for income replacement benefits in Ontario from the respondent under the *Schedule*. She disclosed the benefits she had received under the Quebec insurance scheme. The respondent provided income replacement benefits to the applicant of \$145.66 per week starting on November 6, 2014. These benefits were terminated on June 10, 2016 for medical reasons. The applicant initiated an application to the Tribunal to dispute this termination.
11. The respondent initially claimed that income replacement benefits were paid in error and requested repayment of these benefits, but has now withdrawn this claim. In doing so, they do not acknowledge any liability for further payments to the applicant.

Law and Analysis:

12. This case involves a complicated situation involving two jurisdictions and languages. The Ontario accident benefit scheme has been found to have social welfare and consumer protection purposes, and must be liberally interpreted as a result¹. In this context, and on a plain reading of the *Schedule*, I find that the applicant can proceed with her Application regarding income replacement benefits.

a) Who is an "insured person" under the *Schedule*?

13. The applicant meets the definition of an "insured person" under the *Schedule*. Section 3 of the *Schedule* states that an "insured person" includes, in respect of a particular motor vehicle liability policy, the "spouse of the named insured" if they are "involved in an accident in or outside Ontario that involves the insured automobile or another automobile".

¹ *Youden v Economical Insurance Company* 29 OR (3d) 411, as cited in *Rampersaud v TD General Insurance Co.* [2013] OFSCD No.22 FSCO A11-002773 at para 18.

14. Based on this definition, the applicant falls within the category of an “insured person” under the *Schedule*. She was involved in an accident in Ontario, and was the spouse of a named insured.

b) Is the Applicant’s place of residence relevant to her eligibility for income replacement benefits?

15. The respondent argues that the applicant is not eligible for accident benefits in Ontario because she was a resident of Quebec at the time of the accident. They submit that the SAAQ is her main benefit provider and only source of accident benefits, that she must pursue her claim with the SAAQ, and has no right to abandon it.

16. I find that the applicant’s place of residence is not relevant to whether or not she is eligible for accident benefits in Ontario. Residence would only be relevant if the accident took place outside of Ontario (as outlined in s.3(c) of the *Schedule*). In this case, however, the accident occurred in Ontario. Section 3 of the *Schedule* defines who is an “insured person”, and the applicant meets this definition. Place of residence is not listed as a criterion for determining whether or not a claimant involved in an accident in Ontario can apply for accident benefits in Ontario. It is therefore unnecessary for me to make a determination regarding the applicant’s place of residence.

c) Can an “insured person” in Ontario also claim benefits in other jurisdictions?

17. The respondent argues that because the applicant is a Quebec resident, the SAAQ is the applicant’s only source of accident benefits. I disagree. The applicant is an “insured person” under the *Schedule*, which provides that an insured person may have access to income replacement benefits in other jurisdictions in addition to benefits in Ontario.

18. Section 4(1)(b) of the *Schedule* provides a definition of “other income replacement assistance” as including

the amount of any gross weekly payment for loss of income that is received by or available to the person as a result of the accident under the laws of any jurisdiction...

19. On a plain reading, “other income replacement assistance” (also referred to as “OIRA”) includes benefits such as the income loss benefit compensation received by the applicant under the SAAQ. These SAAQ benefits are a “payment for loss of income that is received or available as a result of the accident.” Nothing turns on the fact they are paid on a bi-weekly rather than weekly basis.

20. The *Schedule* includes provisions which outline how the receipt of other income replacement assistance will affect benefits available in Ontario. For example, section 7(1) of the *Schedule* states that other income replacement assistance is deducted from income replacement benefits. It does not provide that insured persons are precluded from receiving benefits under the *Schedule* as a result of receiving other income replacement assistance from another province.
21. These provisions make it clear that an “insured person” can therefore be eligible for benefits in Ontario, even if they have received benefits in other jurisdictions such as Quebec.
- d) How do accident benefits under the SAAQ and the *Schedule* interact?
22. The respondent submits in the alternative that if the applicant is entitled to claim benefits in Ontario, she may only do so to the extent that the Ontario benefits exceed those available from Quebec. It asserts that there are no benefits available in Ontario because the applicant’s periodic income-related benefits were higher under the SAAQ than what would have been available under the *Schedule* for income replacement benefits.
23. This argument is somewhat confusing, because the applicant does not claim income replacement benefits during the same period she received benefits from Quebec. She received \$743.27 every two weeks under the SAAQ after the accident until November 5, 2014, when the SAAQ benefits were terminated. On November 20, 2014 she then applied for income replacement benefits in Ontario under the *Schedule*. The question of “excess” benefits therefore appears to be irrelevant, because she is not applying for “excess” benefits during the period she was receiving benefits under the SAAQ. Rather, she is claiming income replacement benefits under the *Schedule* for a time period when she was not receiving anything under the SAAQ.
24. Section 7(1) of the *Schedule* discusses the amount of income replacement benefits. The *Schedule* states that other income replacement assistance “for the particular week the benefit is payable” will be deducted [emphasis added]. In this case, there is nothing to deduct from the applicant’s income replacement benefits because she did not receive any other income replacement assistance during the period in question. The amount of benefits the applicant received from Quebec under the SAAQ are therefore not relevant under the *Schedule*, because they were not received in the “particular week[s]” that the applicant is claiming income replacement benefits in Ontario.

25. The decision in *Dubreuil v AXA Insurance*² (“*Dubreuil*”) was cited by the respondent in support of its position that benefits under the SAAQ are the applicant’s “main” or “only” source of accident benefits.
26. I find that the decision in *Dubreuil* does not stand for this proposition, and in fact is consistent with the position and actions of the applicant. In *Dubreuil*, the widow of an accident victim who died in an Ontario accident claimed death benefits under both the SAAQ and the *Schedule*. The Arbitrator found that the claimant had to apply for benefits under the SAAQ as she was a Quebec resident, and was unable to claim the full amount of both the Ontario and Quebec death benefits. She was, however, entitled to claim in Ontario any additional amount over what was available from the SAAQ.
27. In my view, the *Dubreuil* case does not provide that a claimant can only apply for benefits in Quebec if they are a Quebec resident as asserted by the respondent. Rather, it stands for the principle that accident victims can claim in both provinces, but that there is no double compensation. While a claimant cannot receive full benefits from both provinces, according to the decision in *Dubreuil* they can receive additional benefits in Ontario if the Ontario benefit amount is higher than the benefit available in Quebec.
28. This is analogous to the applicant’s case, even though *Dubreuil* dealt with a lump sum death benefit, and the applicant is claiming periodic income replacement benefits for a different time period than when she was receiving income related benefits under the SAAQ. Although it is not necessary for me to make a finding regarding the applicant’s place of residence, or to interpret Quebec accident benefit legislation, it should be noted that according to the submissions of the parties, the applicant listed a Quebec address in her application for SAAQ benefits, and that the SAAQ found that she was eligible for benefits as a resident of Quebec. If it was the case that the applicant was a Quebec resident, according to the submissions of the parties it appears that she followed the correct procedure under the SAAQ. She applied first for benefits in Quebec, and only sought benefits in Ontario after her Quebec accident benefits were terminated. She disclosed her SAAQ benefits when applying for accident benefits with the respondent. She is claiming income replacement benefits in Ontario for a time period after she was deemed ineligible for the analogous benefits in Quebec, so there is no issue of double compensation or “excess” benefits.
29. The respondent notes that the applicant has not appealed the termination of her SAAQ income replacement indemnity, and states that she has no right to abandon her Quebec claim to pursue another in Ontario. However, as held in the case of

² FSCO A98-000290 (January 25, 1999)

*Vanderkop v Personal Insurance Co. of Canada*³ there is no obligation on an insured

to litigate with their collateral benefits insurer, at their own risk and expense, for the benefit and at the discretion of, their accident benefits insurer (at para.26).

30. There is no evidence before me regarding why the SAAQ income replacement indemnity was terminated or why the termination was not disputed by the applicant, but I find that the applicant was not required to pursue this claim further in order to access additional benefits in Ontario. Although the benefits in dispute are not collateral benefits, I find that they are analogous benefits, and as a result, that the applicant should not be penalized here because she did not assume the risk and expense to dispute the termination of her SAAQ income-related benefits.
31. I find that the applicant is entitled to claim income replacement benefits in Ontario, and is not precluded from pursuing her application with the Tribunal.

Costs:

32. The applicant has requested the costs of this preliminary issue hearing.
33. The Tribunal can only order costs where a party has established that another party in a proceeding has acted unreasonably, frivolously, vexatiously or in bad faith in accordance with Rule 19.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure*.
34. The applicant has not at this point claimed or provided evidence regarding unreasonable, frivolous, vexatious, or bad faith behaviour by the respondent during the proceeding. As a result, I dismiss their request for costs.

Conclusion:

35. For the reasons set out above, I find that the applicant is entitled to pursue her claim for income replacement benefits in Ontario, and deny the Respondent's request to dismiss the application. The question of the applicant's eligibility for income replacement benefits can now proceed to a hearing.

Released: 03/02/2017

Cynthia Pay,
Adjudicator

³ 2009 ONCA 511