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

Ontario

Date: 2017-11-10
Tribunal File Number: 16-004212/AABS
Case Name: 16-004212 v Allstate Insurance Company of Canada

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:

S.K.

Applicant

and

Allstate Insurance Company of Canada

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: **Chloe Lester**

APPEARANCES:

For the Applicant:	Rizwan Wancho, counsel
For the Respondent:	Ryan Kirshenblatt, counsel
Dari Interpreter:	Khalil Popal
Court Reporter:	Kathy Green
Hearing Dates:	**May 23, 2017, June 14, 2017 and June 15, 2017**

Overview

[1] The applicant, S.K. was injured in a motor vehicle accident on May 28, 2012. The applicant is self-employed and due to the accident was unable to continue working. He applied for income replacement benefits ("IRB's") under the *Statutory Accident Benefits Schedule, Effective September 1, 2010* (the "Schedule"). The applicant is claiming entitled to IRB's from June 4, 2012 until May 28, 2014.

[2] In letters dated September 12, 2012[1], December 17, 2012[2], and February 8, 2013[3] (the "s. 33 letters"), the respondent, Allstate Insurance Company of Canada ("Allstate"), requested several documents under s. 33 of the Schedule in order to determine entitlement and the quantum of IRB. As the applicant failed to provide all the required documents listed in those letters, he was held in non-compliance effective January 14, 2013 and no benefits were payable to him.

[3] A dispute arose between the parties as to how to calculate the quantum of IRB, and for what time period. Also, Allstate is raising a preliminary issue that the applicant is statute barred because he failed to commence his application to the Licence Appeal Tribunal (the "Tribunal") within 2 years after the insurer's refusal to pay the amount claimed.

[4] The applicant filed an application for dispute resolution to the Tribunal on December 1, 2016. At the time of the hearing, Allstate confirmed that other than the limitation period and the applicant's failure to provide the requested documents, his impairments meet the test for entitlement to an IRB.

Issues in Dispute:

[5] The issues in dispute[4] are as follows:

(i) Is the applicant statute barred from proceeding with his claim for an income replacement benefit pursuant to s. 56 of the Schedule?
(ii) Has the applicant failed to comply with a s. 33 request and should he be held to be in a period of non-compliance effective January 14, 2013?
(iii) Is the applicant entitled to receive a weekly income replacement benefit in the amount of $362.13[5] per week or in some other amount from June 4, 2012[6] until May 28, 2014?
(iv) Is the applicant entitled to interest on the overdue payment of benefits?

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[1] Exhibit 15
[2] Exhibit 17
[3] Exhibit 19
[4] The issues in dispute have been changed from the Order dated March 3, 2017 and May 19, 2017 to reflect the issues that were brought forward and agreed to during the hearing.
[5] The amount of $362.13 was agreed upon by the parties as the weekly income replacement benefit
[6] This date has been altered to reflect the one week income replacement benefit waiting period.

Results:

[6] The applicant is statute barred from proceeding with his claim as he failed to submit an application to the Tribunal within 2 years of Allstate's refusal to pay the amount claimed.

Procedural Issues:

[7] During the hearing, various procedural issues were raised by the parties, including, adding of issues and submitting last minute evidence regarding the entitlement/quantum of IRB. After hearing the submissions of the parties I made decisions on those issues, but they will not form the basis of this decision as the applicant is statute barred from proceeding with his claim.

[8] After the hearing, the applicant filed a motion[7] asking to add two additional issues: first, an award under regulation 664 because Allstate unreasonably withheld or delayed payments; and second, the issue of costs of the hearing. The motion will be dealt with at the end of the decision.

Section 56 Preliminary Objection

Is the applicant statute barred from proceeding with his claims pursuant to s. 56 of the Schedule?

[9] Allstate claims the applicant is statute barred from proceeding with his claim for income replacement benefits as the applicant did not submit his application to the Tribunal within the two year limitation period.

[10] Section 56 states that the applicant has two years to file for mediation or court proceeding after the *"insurer's refusal to pay the amount claimed"*[8]. Since April 1, 2016 the legislation has changed to reflect that the parties are only able to file an application for dispute resolution to the Tribunal.[9] So in other words, an application must be filed to the Tribunal within two years after the "*insurer's refusal to pay the amount claimed*".

[11] The application was received by the Tribunal on December 1, 2016. So when was the insurer's refusal to pay the amount claimed? Allstate argues that its letter to the applicant and Explanation of Benefits dated February 8, 2013[10], which withheld payment of the IRB for being in non-compliance with a s. 33 request is sufficient to warrant the insurer's refusal to pay. The applicant submits that a s. 33 request cannot trigger a s. 56 limitation and therefore is not a valid refusal to pay the benefit. If it can, the denial has to be clear and unequivocal and explain the dispute

[7] Motion filed on July 7, 2017 to the Tribunal. Submissions were received and reviewed.
[8] Emphasis added.
[9] *Insurance Act*
[10] Exhibit 19

resolution process which as stated in *Falcon v. State Farm*[11] and *Smith v. Co-operators*[12]. He claims the s. 33 letters do not comply with the requirements highlighted in those decisions.

Can a refusal to pay a benefit from a s. 33 request trigger a s. 56 limitation objection?

[12] I find that a refusal to pay a benefit that stemmed from a period of non-compliance in accordance with s.33 can trigger a s. 56 limitation period.

[13] Section 33 of the Schedule allows an insurance company to request information from an applicant that is "reasonably required to assist the insurer" in order to determine entitlement to a benefit, in addition to other requests. The applicant has 10 days to comply with that request otherwise the insurance company has the right to withhold payment of the benefit. Once the applicant complies with the request the benefit will be reinstated. If the applicant has a reasonable explanation for the inability to produce the documents after the 10 days, the benefit is still payable during the period of non-compliance.

[14] In accordance with s. 33, the respondent requested information regarding entitlement to the IRB and since the applicant was self-employed, they requested business and personal tax records in order to calculate the quantum of IRB. The parties acknowledge that the requests were reasonable. The first request for documentation was in a letter dated July 17, 2012. This letter did not specify that the request was being made under s. 33, however it requested many of the same documents necessary to determine entitlement and the quantum of the IRB. Subsequently, the information was requested under s. 33. Those letters were dated September 12, 2012[13], December 17, 2012[14], and February 8, 2013[15] (the "s. 33 letters"). The s. 33 letters detailed the required documents, and the fact that that the applicant had 10 days to do produce the information. They also identified the repercussions for failing to do so.

[15] The letter dated December 17, 2012[16] stated that if the documents were not received by January 14, 2013 there would be no further payments of medical, rehabilitation or income replacement benefits. No documents were produced to the respondent by the January 14, 2013 deadline. As such, a letter dated February 8, 2013[17] was sent by the respondent placing the applicant in a period of non-compliance where the benefits were withheld and were no longer payable to him. In other words, the respondent was refusing to pay the amount claimed.

[11] Falcon v State Farm Mutual Automobile Insurance Co., [2016] O.F.S.C.D. No. 64
[12] Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129
[13] Exhibit 15
[14] Exhibit 17
[15] Exhibit 19
[16] Exhibit 17
[17] Exhibit 19

[16] The refusal is reiterated in the Explanation of Benefits (OCF-9)[18] which was attached to the February 8, 2013 letter. In part 2 of the letter, the box "not eligible/stoppage of benefit" is checked off. This also supports the respondent's position that it was refusing to pay the amount claimed.

[17] Even though a s. 33 request cannot trigger a limitation period – the refusal to pay a benefit that stems from a s. 33 request can. In this case, the refusal to pay the benefit began on January 14, 2013 which is outlined in the February 8, 2013 letter and Explanation of Benefits.

Was the February 8, 2017 letter and Explanation of Benefits (OCF-9) a valid refusal?

[15] I find the letter from Allstate dated February 8, 2013 a valid refusal.

[16] The case law in *Falcon v. State Farm*[19] and *Smith v. Co-operators*[20] stipulates that a valid refusal must be clear and unequivocal such that an unsophisticated individual would understand it. The refusal must also explain the dispute resolution process. The letter dated February 8, 2013 states "no income replacement … benefit are payable to [the applicant][21] effective January 14, 2013. There is no clearer language than the word "no". The letter plainly conveys that no benefits would be payable.

[17] The letter also states that if the applicant does not comply with the request then the insurer has the right to withhold payment of the benefits. Again, a clear and unequivocal way to say the insurer is refusing the pay the amount claimed. As of January 14, 2013 the applicant was placed in the period of non-compliance as per s. 33 of the Schedule.

[18] The letter further directs the applicant to the Explanation of Benefits (the "EOB") attached. The EOB dated February 8, 2013[22] checks off the box "Not Eligible/Stoppage of Benefit" and states that no benefit was payable to the applicant effective January 14, 2013. This further supports a refusal to pay the amount claimed.

[19] The opening paragraph of the EOB explains that if the applicant disagrees with the determination then he has the right to dispute the decision in accordance with Part 6 on page 3 of the form. Part 6 explains the dispute resolution process in an understandable step by step guide. Lastly, Part 6 warns the applicant in bold

[18] Exhibit 28
[19] Falcon v State Farm Mutual Automobile Insurance Co., [2016] O.F.S.C.D. No. 64
[20] Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129
[21] Exhibit 28
[22] Exhibit 28

lettering that there is a two year time limit. It states the applicant has "TWO YEARS from the date of [the][23] insurer's refusal to pay… a benefit to arbitrate or commence a lawsuit in court…". Those steps are also outlined in Part 6.

[20] A step by step guide is a straightforward way to explain the dispute resolution process. Bolding and using the word "warning" is a direct way of showing the applicant to pay attention to this area. A readable way to explain that he only has two years to dispute the claim.

[21] The letter dated February 8, 2013 and attached EOB was clear, unequivocal and explained the dispute resolution process.

Did the applicant provide a reasonable explanation?

[22] As stated before, the claimant's failure to comply with a s. 33 request allows an insurance company to cease payments for a period of time until the request is complied with.

[23] Section 34 of the Schedule allows the benefit to be payable, even past the deadline, if the insured provides a reasonable explanation. The applicant argues that as long as he provides a reasonable explanation, the refusal to pay or termination letter is invalidated and therefore the two year time limitation does not apply. So did the applicant provide a reasonable explanation?

[24] The first time the respondent heard the applicant's alleged "reasonable explanation" was on the stand as he testified at the hearing. He claimed that the reason he was not able to provide the documentation by the deadline was because he was injured by the accident. He stated that he is responsible for putting together the tax documentation for his company and was not able to do so because of his injuries. These documents were finally produced to the respondent approximately 4 years after the accident.

[25] I find the applicant's claims are not a reasonable explanation for the delay for the following reasons:

(i) The applicant alleges he is responsible for the putting together the tax documentation and was not able to do so. According to the tax records over those years, the applicant was not in control of his company during the period he is claiming IRB. His wife was in control of his company during that time. The wife was not involved in the car accident and in 100% control of the company. There was no explanation provided as to why his wife was not capable of completing the tax records.

[23] Exhibit 28

(ii) We also know the applicant took back ownership of his company after May 28, 2014. He provided no explanation as to why it took him more than two years after his reinstatement to the company to comply with the request from the respondent.

[26] I find the applicant did not provide a reasonable explanation for failing to comply with the respondent's request and therefore remained in a period of non-compliance effective January 14, 2013. The parties agree that it was a reasonable request in order to assess the applicant's entitlement to IRB.

Conclusion

[27] After reviewing the submissions of the parties, the s. 33 letter dated February 8, 2013 constitutes a valid refusal to pay the amount claimed. The applicant had two years from that date of the effective termination, January 14, 2013, to file an application for dispute resolution services. He failed to do so and therefore is statute barred from proceeding with his claim.

Post- Hearing Motion

[28] The applicant filed a motion dated July 7, 2017 with the Tribunal requesting an award under Ontario Regulation 664[24] and costs of the hearing. Both the applicant and respondent had an opportunity to argue the motion via written submissions.

[29] An award under O/Reg 664 grants a monetary value to the applicant when the respondent unreasonably withholds or delays payment of benefits. As the applicant has been statute barred from proceeding with his claim, the request for an award under Regulation 664 cannot succeed.

[30] The applicant has also requested costs of the hearing under rule 19 of the *Licence Appeal Tribunal Rules of Practice and Procedure*. Rule 19 allows a party to request costs when they believe that another party has acted unreasonably, frivolously, vexatiously or in bad faith during a proceeding. A "proceeding" according to rule 2.17 defines it as "the entire Tribunal process from the start of the appeal to the time a matter is finally resolved". A "party" according to rule 2.16 means "a person, association or corporation who has the right to participate in the proceeding…".

[31] For this application the term "party" refers to the applicant or the respondent. So the applicant or respondent must act in such a way, from the start of the appeal until the matter is resolved, that could be classified as unreasonable, frivolous, vexatious or in bad faith.

[32] Costs under rule 19.2 can be requested at any time before the decision or order is released.

[24] O/Reg 664 R.R.O 1990

[33] The applicant claims he meets the requirements for costs for the following reasons:

(i) Two of the respondent's witnesses allegedly conceded certain facts;
(ii) The respondent forced the applicant to bring his accountant as a witness despite the fact he was financially unable to cover his costs;
(iii) The respondent called two accountants as witnesses, whereas the applicant only had one and therefore caused a disproportionate process;
(iv) The respondent allegedly relied on transcripts from the first day of the hearing to quote certain agreements. As the applicant was financially not able to cover the costs of those transcripts, he could not recall certain events and again this caused a disproportionate process.
(v) The respondent had ordered surveillance, had requested to use this surveillance during the hearing, and then never used it. This allegedly had a vexatious effect on the hearing.

[34] The respondent denies the claims as it would involve the Tribunal finding these allegations as facts, there have been no arguments as to the financial limitations of the applicant and it was an order made by me that made the applicant call the accountant as a witness.

[35] Based on the submissions of the parties, the request for costs is denied.

[36] A witness allegedly conceding certain facts does not constitute conduct that would garner costs of a hearing.

[37] The applicant was forced to bring his accountant as a witness by the adjudicator. The applicant wanted to submit an accounting report into evidence. The respondent wanted to cross-examine the witness who authored the report. I issued a decision based on the submissions of the parties that it was the responsibility of the applicant to summons the witness as it was his witness' evidence he was leading at the hearing.

[38] At the end of the first day of the hearing, the applicant and respondent agreed that the respondent may call two accountants as witnesses. The agreement limited the scope of each accountant's evidence. An agreement between the parties does not trigger costs of the hearing.

[39] No evidence has been produced by the applicant to show the respondent had transcripts of the hearing or that there was a financial burden on the applicant to get them produced.

[40] As the surveillance was never used at the hearing, there was no vexatious effect on the adjudicator or the hearing. If a party chooses not to pursue evidence it does

not mean it creates a biased effect on the hearing. The applicant could have entered the video into evidence in order to quash the alleged vexatious effect.

[41] In review of the allegations put forward by the applicant, and the arguments tendered by the respondent, the claim for costs of the hearing are denied as they do not meet the requirements under the Tribunal's Rules of Practice and Procedure.

Order

[42] I order the application and the motion to be dismissed.

Released: November 10, 2017

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Chloe Lester, Adjudicator