



**Citation: Smektala v. TD Insurance Meloche Monnex, 2021 ONLAT 20-006086/AABS-PI**

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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:

**Ewa Smektala**

**Applicant**

and

**TD Insurance Meloche Monnex**

**Respondent**

**PRELIMINARY ISSUE DECISION**

**ADJUDICATOR: Lindsay Lake**

**APPEARANCES:**

For the Applicant: Gerald S. George, Counsel

For the Respondent: Amanda Colarossi, Counsel

**HEARD: By Way of Written Submissions**

## BACKGROUND

- [1] On May 2, 2018, the applicant, Ewa Smektala, was injured in an automobile accident in the course of her employment as a personal support worker with ParaMed Home Health Care.
- [2] On May 9, 2018, the Workplace Insurance and Safety Board (WSIB) wrote to the applicant advising that she had the following two options:
- (i) Sue the person(s) responsible for the collision plus claim benefits under her automobile insurance policy; or
  - (ii) Claim WSIB benefits.<sup>1</sup>
- [3] In the same correspondence, the WSIB advised the applicant that she was not able to choose both options and encouraged her to obtain legal advice.
- [4] On or about May 10, 2018, the applicant submitted an Application for Accident Benefits (OCF-1) to the respondent, TD Insurance Meloche Monnex, seeking accident benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (Schedule)*.<sup>2</sup>
- [5] On June 13, 2018, the respondent advised the applicant that she was eligible for income replacement benefits (IRBs) commencing on May 10, 2018.<sup>3</sup>
- [6] On August 15, 2018, the applicant contacted the WSIB regarding the availability of benefits to her under the *Workplace Safety and Insurance Act, 1997 (WSIA)*.<sup>4</sup> On this date, the applicant was provided with verbal consent to file her election form with the WSIB beyond the three-month deadline set out in the *WSIA*.<sup>5</sup>
- [7] On August 15, 2018, the applicant submitted a signed Election Form to WSIB which indicated that she:
- (i) Was choosing to claim WSIB benefits; and
  - (ii) Had applied for, and received, benefits from an automobile insurance company.<sup>6</sup>

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<sup>1</sup> Document Brief of the Applicant, tab 1.

<sup>2</sup> O. Reg. 34/10.

<sup>3</sup> Written Brief of the Respondent, tab 21.

<sup>4</sup> S.O. 1997, c. 16, Sched. A.

<sup>5</sup> WSIB File, Written Brief of the Respondent, tab 24, page 132.

<sup>6</sup> *Ibid.* at page 136.

- [8] On August 16, 2018, the WSIB advised the applicant that it was unable to process her election form because her claim involved an accident in which she applied for and was receiving benefits from an automobile insurance company.<sup>7</sup>
- [9] On August 21, 2018, the respondent provided an Assignment of Workplace Safety & Insurance Benefits form (assignment form) to the applicant and requested that she complete it and submit it to WSIB.<sup>8</sup>
- [10] On September 7, 2018, the applicant filed the completed assignment form with the WSIB.<sup>9</sup>
- [11] On September 25, 2018, the respondent notified the applicant that her IRBs would terminate on October 3, 2018 following the outcome of an insurer's examination.<sup>10</sup>
- [12] On October 17, 2018, the WSIB advised the applicant that she was eligible to receive WSIB healthcare benefits for her injuries from the accident but not WSIB Loss of Earnings benefits.<sup>11</sup>
- [13] On December 20, 2018, the respondent advised the applicant that it was closing her accident benefits file as she was receiving WSIB benefits.<sup>12</sup>
- [14] On February 8, 2019, the WSIB also closed the applicant's file as it made the decision that the applicant had recovered from her accident-related injuries and that she was fit to return to her pre-injury employment.<sup>13</sup>
- [15] On February 19, 2019, the respondent sought a repayment of benefits from the WSIB for benefits it paid to the applicant in the total amount of \$11,170.18 (\$8,800.00 for income replacement benefits and \$2,370.18 for medical rehabilitation benefits).<sup>14</sup> The respondent submitted that WSIB has since repaid the medical rehabilitation benefits portion of the amount requested.

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<sup>7</sup> Document Brief of the Applicant, tab 8.

<sup>8</sup> Document Brief of the Applicant, tab 9.

<sup>9</sup> *Supra* note 5 at page 136.

<sup>10</sup> Document Brief of the Applicant, tab 11.

<sup>11</sup> Document Brief of the Applicant, tab 12.

<sup>12</sup> Written Brief of the Respondent, tab 18.

<sup>13</sup> Document Brief of the Applicant, tab 13. A follow-up letter was also sent from WSIB to the applicant on June 4, 2019 confirming the file's closure.

<sup>14</sup> Written Brief of the Respondent, tab 20.

- [16] On April 21, 2020, the applicant issued a Statement of Claim regarding her injuries sustained in the accident.<sup>15</sup>
- [17] On June 1, 2020, the applicant applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) and a case conference was held on October 22, 2020. A written preliminary issue hearing was scheduled to determine whether the applicant’s re-election to sue in tort was not made primarily for the purpose of claiming accident benefits and, as a result, whether she is entitled to proceed with her claim for accident benefits from the respondent.

### **PRELIMINARY ISSUE IN DISPUTE**

- [18] Is the applicant entitled to claim benefits in accordance with s.61(2) of the *Schedule*?

### **RESULT**

- [19] I find that the applicant is not entitled to claim accident benefits from the respondent for injuries that she sustained as a result of the accident as she failed to meet her onus of proving on a balance of probabilities that her re-election to sue in tort on April 21, 2020 was not made for the primary purpose of receiving benefits under the *Schedule*. As a result, the application is dismissed.

### **ANALYSIS**

- [20] There is no dispute between the parties that the applicant initially applied for, and received, accident benefits under the *Schedule* from the respondent.
- [21] The applicant claims, however, that her re-election to receive WSIB benefits was not valid, and that her original election to receive accident benefits under the *Schedule* should stand because she was:
- (i) Unrepresented and confused regarding her options; and/or
  - (ii) Deemed to have elected to sue in tort pursuant to sections 30(4) and (6) of the *WSIA*.
- [22] Alternatively, if I find that the applicant’s re-election for WSIB benefits was valid, the applicant submitted that she has now re-elected to sue in tort by issuing her

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<sup>15</sup> Document Brief of the Applicant, tab 15.

Statement of Claim and that this re-election was not made for the primary purpose of claiming benefits under the *Schedule*.

- [23] For the reasons that follow, I find that the applicant's election to receive WSIB benefits was valid. I also find that the applicant has failed to prove on a balance of probabilities that the primary purpose of her re-election to sue in tort was not made to claim benefits under the *Schedule*.

#### **The applicant's election to receive WSIB benefits was valid**

- [24] After initially receiving benefits under the *Schedule* from the respondent, the applicant submitted a signed election form to the WSIB on August 15, 2018 indicating that she wanted to claim WSIB benefits. The applicant completed the election process by submitting the assignment form, and she was ultimately approved to receive certain WSIB benefits on October 17, 2018.
- [25] The applicant submitted that her election to receive WSIB benefits was not valid, however, because she was uninformed about the true nature of her election to receive WSIB benefits as she was unrepresented at the time of her election and confused by the complex legal regime under the *Schedule*.
- [26] There is no evidence before me to support a finding that the applicant was confused on or about August 15, 2018 when she first contacted WSIB about receiving WSIB benefits and when she subsequently filed her election and assignment forms. Further, the WSIB encouraged the applicant to obtain legal advice regarding her options as early as May 9, 2018.<sup>16</sup>
- [27] I also do not agree with the applicant that she was deemed to have elected to sue in tort based on sections 30(4) and (6) of the *WSIA*. Section 30(4) requires a person to inform WSIB of their election for benefits within three months of an accident. Section 30(6), however, only deems a person to have elected not to receive WSIB benefits in the situation where an election is not made, or a notice of election is not given. In this matter, the applicant provided her signed election form to WSIB on August 15, 2018 after receiving verbal permission to file her election form outside of the three-month limitation period. The WSIB's extension of the three-month limitation period is permissible under s. 30(5) of the *WSIA*. Therefore, I find that s. 30(6) of the *WSIA* does not apply in this matter as the applicant provided notice of her election to the WSIB which was not rejected but, indeed, accepted as the applicant received benefits under the *WSIA* for a time.

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<sup>16</sup> *Supra* note 1.

- [28] For all the reasons set out above, I find that the applicant's election to receive WSIB benefits was valid.

### **The primary purpose of the applicant's re-election to sue in tort**

- [29] It is undisputed that the applicant was entitled to WSIB healthcare benefits as a result of the accident. Therefore, the respondent is not required pursuant to s. 61(1) of the *Schedule* to pay accident benefits to the applicant unless the applicant falls within the exception provided for in s. 61(2), which states:

Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* **if the election is not made primarily for the purpose of claiming benefits under this Regulation** (my emphasis added).

- [30] The applicant submitted that she re-elected to sue in tort on April 21, 2020 by issuing the Statement of Claim. The Statement of Claim, according to the applicant, demonstrated that she did not elect to sue primarily for the purpose of claiming benefits under the *Schedule*.
- [31] The respondent did not take issue with the applicant's ability to re-elect the option of suing in tort after receiving WSIB benefits. Instead, the respondent submitted that the applicant failed to prove on a balance of probabilities that her election was not made primarily for the purpose of claiming benefits under the *Schedule* and, as a result, the exception under s. 61(2) does not apply. On the evidence before me, I agree with the respondent.
- [32] Both parties cited the decision of *16-002364 v. The Personal Insurance Company (16-002364)*<sup>17</sup> in which the Tribunal set out a number of guiding principles to analyze whether an applicant's election under s. 61(2) is not made "primarily for the purpose" of claiming benefits under the *Schedule*. I find that the following principles set out in *16-002364* are persuasive and helpful in determining the "primary purpose" of an election under s. 61(2):
- (i) It is the applicant's obligation to prove that their election for tort and accident benefits falls within the exception of s. 61 of the *Schedule* and this determination is largely fact driven;

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<sup>17</sup> 2017 CanLII 148445 (ON LAT).

- (ii) The relevant point of time when determining the applicant's "primary purpose" is at the time of the election;
- (iii) Determining the "primary purpose" involves determining the applicant's mindset at the time of the election and, therefore, the test is inherently a subjective one to consider if the choice was made in good faith;
- (iv) Although the test is subjective, the Tribunal must consider "objective" factors in evaluating the applicant's motives. These factors include the strength of the court action, the steps taken to pursue the claim, and any advantages that might have led the applicant to choose accident benefits over WSIB benefits. Action or inaction since the election and the strength of the action can shed light on the true mindset of the applicant. Challenges to successfully establishing liability in tort are also a factor to consider; and
- (v) The election must be a "real choice" as opposed to forum shopping on the question of disabilities although there may be circumstances where a *bona fide* re-election can be made after a final refusal for benefits by the WSIB.<sup>18</sup>

[33] I find that the applicant failed to meet her onus of proving that her re-election to sue in tort falls within the exception set out in s. 61(2) of the *Schedule* because I have no evidence from the applicant regarding her mindset at the time of her re-election. Unlike the decision in *16-002364* where there was affidavit evidence from the applicant,<sup>19</sup> there is no subjective evidence before me to demonstrate that the applicant's decision to sue in tort was a choice made in good faith.

[34] Moreover, while the applicant made several submissions regarding the viability and likelihood of success of her tort action, there is no evidence before me to support these submissions. Again, unlike the decision in *16-002364* where there was an affidavit from the applicant's counsel in the tort action,<sup>20</sup> there is no evidence before me that speaks to the strength of the applicant's tort action notwithstanding the fact that she was not at fault in the accident.

[35] In sum, I find that simply filing a statement of claim without supporting information does not overcome the applicant's burden to prove on a balance of probabilities that she did not re-elect to sue in tort primarily for the purpose of claiming

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<sup>18</sup> *Ibid.* at paras. 25-31.

<sup>19</sup> *Ibid.* at para. 9.

<sup>20</sup> *Ibid.* at para. 38.

benefits under the *Schedule*. Therefore, I find that the applicant does not fall within the exemption provided in s. 61(2) of the *Schedule*.

## **ORDER**

[36] I find that the applicant is not entitled to claim accident benefits from the respondent for injuries that she sustained as a result of the accident as she failed to meet her onus of proving on a balance of probabilities that her re-election to sue in tort on April 21, 2020 was not made for the primary purpose of receiving benefits under the *Schedule*. As a result, the application is dismissed.

**Released: October 29, 2021**

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**Lindsay Lake, Adjudicator**