



Citation: Tyulyakov v. Allstate Insurance Company of Canada, 2022 ONLAT 19-008754/AABS

Licence Appeal Tribunal File Number: 19-008754/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:

Volodymyr Tyulyakov

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION AND ORDER

ADJUDICATOR: Stephanie Kepman

APPEARANCES:

For the Applicant: Michael Brill, Counsel

For the Respondent: Ryan Kirshenblatt, Counsel

HEARD: By way of written hearing

REASONS FOR DECISION AND ORDER

BACKGROUND

- [1] The applicant was involved in an automobile accident on **August 7, 2017**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)*¹ (“*Schedule*”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“*Tribunal*”).

PRELIMINARY ISSUES

- [2] The following preliminary issue is before the Tribunal:
- a. Is the applicant restricted under section 55(1) of the *Schedule* to apply to the Tribunal to dispute the income replacement benefit in the amount of \$400.00 per week, as the applicant has not notified the respondent of the circumstances giving rise to a claim for said benefit?

LAW

- [3] Section 32(6) of the *Schedule* states that if an insurer receives an incomplete or unsigned application, it shall notify the applicant within ten business days after receiving the application and advise the applicant of the missing information needed or required signature.
- [4] Section 32(7) of the *Schedule* states that an insurer shall not give notice under section 32(6) unless the insurer, after a reasonable review of the incomplete application, is unable to determine, without the missing information, if a benefit is payable or the application has not been signed by the applicant.
- [5] Section 33(1) of the *Schedule* states that an applicant shall, within 10 business days after receiving a request from the insurer, provide the insurer with any information required to assist it in determining the applicant’s entitlement to benefits.
- [6] Section 34 of the *Schedule* states that a person’s failure to comply with a time limit of Part VIII: Procedure for Claiming Benefits, does not disentitle the person to a benefit if the person has a reasonable explanation.

¹ O. Reg. 34/10 as amended.

- [7] Section 35(1) of the *Schedule* states that if an applicant qualifies for two or specified benefits, being the income replacement benefit (“IRB”) the non-earner benefit (“NEB”) and the caregiver benefit, the insurer shall, within 10 business days after receiving the application, give notice to the applicant advising that the applicant must elect, within 30 days after receiving the notice, the benefit he wishes to receive.
- [8] Section 36(2) of the *Schedule* states that an applicant applying for a specified benefit shall submit a completed disability certificate with his application under section 32 of the *Schedule*.
- [9] Section 36(3) of the *Schedule* states that an applicant who fails to submit a completed disability certificate is not entitled to a specified benefit for any period before the completed disability certificate is submitted.
- [10] Section 44(1) of the *Schedule* states that in order to help an insurer determine if an insured person is, or continues to be entitled to a benefit that the insured person applied for under the *Schedule*, but not more than is reasonably necessary, the insurer may require the insured person to be examined by one or more people, chosen by the insurer, who are regulated health professional or who have expertise in vocational rehabilitation.
- [11] Section 55(1)1 of the *Schedule* states that an insured person shall not apply to the Tribunal under subsection 280(2) of the *Insurance Act* if the insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or has not applied for the benefit within the times prescribed by the *Schedule*.

AGREED FACTS

- [12] The parties agreed to the following facts:
- The applicant was involved in the subject accident, as well as a previous accident on July 24, 2017.
 - The applicant submitted an Application for Accident Benefits (“OCF-1”) to the respondent on approximately September 11, 2017², where the applicant reported being employed as a truck driver and submitted that his accident-related injuries prevented him from working from August 5, 2017, and ongoing.

² Applicant’s OCF-1 dated September 11, 2017.

- The applicant provided the respondent with a disability certificate³ (“OCF-3”) on September 8, 2017, by Dr. Mikhail Shteybeng, chiropractor.
- The applicant received an Explanation of Benefits⁴ (“EOB”) dated September 27, 2017, where the respondent confirmed receipt of the applicant’s OCF-3 of September 8, 2017.
- The applicant withdrew his OCF-3 of September 8, 2017, on September 28, 2017⁵, because it contained the claim number for the applicant’s previous accident.

[13] The issue for the Tribunal to determine is if the applicant properly submitted an OCF-3 for the subject accident in order to be able to pursue an income replacement benefit (“IRB”).

POSITIONS AND EVIDENCE

- [14] The applicant submitted that he submitted a valid OCF-3 for the subject accident. The respondent argued that the applicant cannot proceed with his application since he has yet to file an OCF-3 in relation to the subject accident.
- [15] The applicant submitted he provided the respondent with his OCF-3 in relation to both accidents, authored by Dr. Shtenyberg on approximately September 8, 2017.
- [16] The applicant argued that his OCF-3 was initially submitted in relation to both accidents and subsequently withdrawn in relation to his previous accident. The applicant conceded that due to the wrong claim number appearing on the OCF-3, he withdrew the OCF-3 via letter on September 28, 2017. The applicant submitted that the OCF-3 that was filed was clearly for the subject accident as it cited the date of the subject accident and not the previous accident.
- [17] The applicant argued that he was injured as a result of his first accident, but was able to return to work, however, was not able to do so after his second accident and relied on the Affidavit of Alexander Makaronet⁶, the applicant’s previous counsel, which confirmed this.

³ OCF-3 of Dr. Schteyberg dated September 8, 2018.

⁴ EOB from the respondent to the applicant, dated September 27, 2017.

⁵ Letter from the applicant’s representative to the respondent dated September 28, 2017.

⁶ Affidavit of Alexander Makaronets dated May 11, 2021.

- [18] The applicant argued that the EOB⁷ from the respondent of September 28, 2017, did not mention the subject accident but instead, stated that the applicant returned to work after his previous accident. The applicant submitted that his OCF-3 clearly showed the applicant's inability to work after the subject accident since that was the date of the accident written on the OCF-3, and therefore, he has shown that the respondent accepted his OCF-3 for his subject accident.
- [19] This EOB also acknowledged that the applicant had not been working since August 5, 2017. The EOB also made section 33 requests of the applicant but did not specifically request a new OCF-3 of the applicant, which the applicant argued again shows that the respondent accepted his OCF-3.
- [20] The applicant submitted that his position is confirmed in the Affidavit of Alexander Makaronet⁸, the applicant's previous counsel, which stated:
- “On September 28, 2017, our office responded back advising the Respondent that the Applicant is not claiming the Income Replacement Benefit for the accident of July 24, 2017 as he returned to work on July 29, 2017. As a result, Barapp Law withdrew the OCF-3 Disability Certificate dated September 8, 2017, specifically for the accident dated July 24, 2017.”
- [21] Mr. Makaronet stated that the OCF-3 in dispute was filed in relation to both accidents and that the applicant advised the respondent he would not be seeking an IRB in relation to his first accident.
- [22] The applicant also noted that the EOB failed to provide fulsome information regarding the fact that the applicant stated he had been unable to work since August 5, 2017, which was not related to the applicant's previous attempt to return to work on July 29, 2017.
- [23] The applicant also relied on the respondent's EOB⁹ of October 11, 2017, denying the applicant's entitlement to an IRB for his previous accident. The EOB stated the applicant was not eligible for an IRB because his OCF-1 stated that he had started working on July 29, 2017. The applicant submitted this is not true and demonstrates the respondent's continuous issues with adjusting the applicant's file. The applicant submitted this EOB referred to the applicant's previous accident and its respective OCF-1.

⁷ Explanation of Benefits dated September 27, 2018.

⁸ Affidavit of Alexander Makaronets dated May 11, 2021.

⁹ Explanation of Benefits dated October 11, 2017.

- [24] The applicant submitted he continued to rely on his sole OCF-3 for his subject accident and relied on an email¹⁰ from the applicant's counsel to the respondent dated November 26, 2018, which provided the respondent with an IRB Accounting Report request and the OCF-3. The applicant's evidence did not include a copy of the OCF-3 relied on.
- [25] The applicant also relied on the letter¹¹ addressed by the applicant's new counsel, Michael Brill, to the respondent, which stated all correspondences were to be forwarded to him. The applicant submitted the respondent ought to have notified him that the OCF-3 in dispute was not sufficient or had been withdrawn and a new OCF-3 was required.
- [26] The applicant directed the Tribunal to an email¹² from the respondent, dated August 22, 2019, to the applicant's counsel, which requested an OCF-3 in relation to the subject accident. The applicant submitted that the respondent chose to request the OCF-3 after the expiration of the limitations period.
- [27] The applicant also relied on a communication¹³ he sent to the respondent on September 4, 2020, which noted that his address has changed, and again, the respondent failed to mention the outstanding OCF-3 from the subject accident.
- [28] The applicant submitted that based on section 55(1)(1) of the *Schedule*, he is not barred from proceeding with his request for an IRB for the subject accident because the respondent failed to communicate in a clear, unequivocal and fair manner that his OCF-3 for the subject accident was outstanding, despite providing it to the respondent. The applicant submitted he notified the respondent of the circumstances giving rise to the IRB on multiple occasions, as noted above.
- [29] To this point, the applicant relied on the matter of *Smith v. Co-operators General Insurance Co.*,¹⁴ where the Supreme Court of Canada found that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile insurance. The applicant submitted that he has demonstrated that the respondent has made many errors when adjusting the applicant's file and prejudiced the applicant. Moreover, based on *Smith*, the respondent, who should

¹⁰ Email from the applicant's representative to the respondent dated November 26, 2018.

¹¹ Letter from the applicant's counsel to the respondent dated June 3, 2019.

¹² Email from the respondent to the applicant's representative dated August 22, 2019.

¹³ Letter from the applicant's counsel to the respondent dated September 4, 2020.

¹⁴ *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129, 2002 SCC 30 at para. 11.

be a sophisticated party, must make sure that it deals with the applicant in a clear, unequivocal and fair manner, which was not the case here.

- [30] The applicant also relied on the matter of *Smith v. Intact Insurance Company*¹⁵, where the Tribunal found insurers must communicate in a way that allows the applicant to contemplate if he will receive the benefits he is entitled to. Based on this, the applicant submitted that if the respondent found the disputed OCF-3 insufficient or withdrawn when communicating with the applicant regarding outstanding documents, the respondent ought to have communicated this to the applicant. Therefore, the applicant was unfairly denied the IRB and prejudiced.
- [31] The applicant relied on the matter of *MM. vs. Royal & Sun Alliance Insurance Company of Canada-007290/AABS*¹⁶, which refers to the matter of *18-005114 v Allstate Insurance Company*¹⁷, and found that the Tribunal can extend the time limits. Furthermore, based on *18-005114*, based on the extensive communication between the parties, it was clear how the applicant could appreciate how his IRB request was being addressed.
- [32] Based on this, the applicant submitted that the large body of communications between the parties demonstrates that he notified the respondent of the circumstances giving rise to the request for an IRB. Additionally, the applicant provided the respondent with his clinical notes and records on several occasions¹⁸.
- [33] The applicant also submitted that based on section 32(6) of the *Schedule*, the respondent was required to follow up with the applicant with respect to his alleged, incomplete OCF-3. The applicant submitted that based on the events discussed above, the respondent failed to do so.
- [34] The applicant relied on the Tribunal's decision of *Snagg. v Certas Home and Auto Insurance Company*¹⁹, where, based on the respondent's actions, it was suggested that the respondent did not receive a complete OCF-3 and failed to raise this issue with the applicant. The Tribunal found that the applicant did complete an OCF-3 and was able to proceed with his application. The applicant submitted that the circumstances in the subject matter are similar, as the

¹⁵ *Smith v. Intact Insurance Company*, 2021 CanLII 28712 (ON LAT) with no specific paragraph referenced.

¹⁶ *M.M. vs. Royal & Sun Alliance Insurance Company of Canada-007290/AABS*, 2020 CanLII 101834 (ON LAT) at para. 19.

¹⁷ *18-005114 v Allstate Insurance Company*, 2018 CanLII 143515 (ON LAT).

¹⁸ On November 22, 2018, July 19, 2019, October 26, 2019, February 18, 2020, July 9, 2020, August 4, 2020, February 1, 8, 22, 2021, March 19 and 30, 2021 and April 9, 2021.

¹⁹ *Snagg. v Certas Home and Auto Insurance Company*, 2021 CanLII 60477 (ON LAT) at para.

respondent did not advise the applicant that his OCF-3 was incomplete and only addressed entitlement. Furthermore, *Snagg* also noted the consumer protection feature of the *Schedule* and found that the appropriate remedy for ambiguity would be in favour of the insured.

- [35] Based on the above, the applicant submitted that the uncertain aspects of section 36(2) of the *Schedule* ought to be remedied in favour of the applicant and therefore, his OCF-3 should be deemed complete within the time limits of the *Schedule*, despite the above-noted issues.
- [36] The applicant also relied on section 32(7)(a) of the *Schedule*, which requires the respondent to address a signed, but incomplete application unless: “the insurer, after a reasonable review of the incomplete application, is unable to determine, without the missing information, whether a benefit is payable”. The applicant submitted that he filed his OCF-3 and if the respondent chose not to accept it, it had an obligation to inform the applicant.
- [37] The applicant submitted that even if the information was missing or incomplete, the parties agreed that the applicant provided the respondent with an OCF-3 and medical information showing he was unable to work after August 7, 2017, and therefore, he provided the information regarding the circumstances of his accident.
- [38] Furthermore, based on section 35(1) of the *Schedule*, the respondent was required, within 10 days after receiving the application, to advise the applicant to elect a specified benefit. The applicant submitted that his OCF-1 indicated he qualified for an IRB and caregiver benefits, but the respondent failed to provide him with an Election of Income Replacement, Non-Earner or Caregiver Benefit (“OCF-10”).
- [39] The applicant also relied on section 34 of the *Schedule* and submitted this section allows the applicant, even if he did not meet the timelines of the *Schedule*, to remain eligible for the IRB, if he provides a reasonable explanation for the delay. The applicant argued he had a reasonable explanation for the delay, based on the issues communicating with the respondent and its failure to request information until after the limitation period expired.
- [40] The applicant does not contest there were errors made by both parties with respect to the applicant’s application, however, he argued that he should not bear the brunt of the prejudice of said issues. Furthermore, the applicant submitted that it is clear he intended to apply for an IRB based on his OCF-3 and provided the respondent with the information giving rise to the benefit.

- [41] The respondent disagreed with the applicant's position and submitted that the applicant failed to submit an OCF-3 for his subject accident; therefore, he is not entitled to proceed with his claim for an IRB pursuant to section 55 of the *Schedule*, as he did not apply for the disputed benefit.
- [42] The respondent also argued that since the applicant has not submitted an OCF-3 for the subject accident at any point, he cannot receive an IRB until he complies. The respondent relied on the OCF-1 from his previous accident²⁰, which was accompanied by a cover letter from the applicant's representative stating that an OCF-3 would be sent shortly²¹. The respondent submitted it assigned the applicant's previous accident claim number AMA582610. The respondent further submitted that it responded to the applicant's OCF-1 with an EOB²² dated August 11, 2017, that denied the applicant an IRB because he was unemployed at the time of his accident. The respondent submitted it again denied²³ the applicant's request for an IRB for his previous accident based on his return to work.
- [43] The respondent submitted that this shows that the applicant had not sent in an OCF-3 for the subject accident, and therefore, the applicant cannot proceed with his request for an IRB.
- [44] Furthermore, the respondent submitted that since the applicant withdrew his OCF-3, the issue of which accident the document related to is moot, as it was withdrawn and never resubmitted or amended by the applicant.
- [45] The respondent submitted that the applicant submitted the disputed OCF-3, which was related to his previous accident and referred to the claim number for the applicant's previous accident, and not the subject accident. To this point, the respondent relied on its EOB of September 27, 2017, which specifically responded to the OCF-3 under the applicant's previous accident.
- [46] The respondent also submitted that in response to its EOB, the applicant chose to withdraw his OCF-3 via letter²⁴, which stated:

“Further to your letter dated September 27, 2017, please be advised that Mr. Tyulyakov is not claiming the Income Replacement benefit for the accident of July 24, 2017 as he returned to work on July 29, 2017.

²⁰ OCF-1 dated July 31, 2017.

²¹ Letter from the applicant's representative to the respondent dated July 31, 2017.

²² Explanation of Benefits from the respondent to the applicant's representative dated August 11, 2017.

²³ OCF-9 from the respondent to the applicant's representatives dated September 13, 2017.

²⁴ Letter from the applicant's counsel to the respondent dated September 28, 2017,

Please consider the OCF 3 Disability Certificate dated September 8, 2017 withdrawn.”

- [47] The respondent submitted this letter contained no restrictions or limitations in terms of the OCF-3’s purpose and does not support the applicant’s position. The respondent submitted the applicant never specifically communicated his intention to use the withdrawn OCF-3 for any purposes, and certainly not in relation to the applicant’s subject accident.
- [48] The respondent also relied on its EOB²⁵ of October 11, 2017, which confirmed that the applicant was not pursuing an IRB and sent this communication in relation to the applicant’s previous accident with claim number AMA582610.
- [49] The respondent also argued that when the applicant submitted an OCF-1 on January 31, 2018, for his subject accident, the cover letter accompanying the fax²⁶ specifically stated: “To follow is Disability Certificate (OCF-3).” The respondent submitted that the applicant failed to provide his OCF-3 for his subject accident.
- [50] Moreover, the respondent noted that the applicant could not direct the Tribunal to a successive OCF-3 related to the applicant’s subject accident and was not noted in the adjuster’s logs notes²⁷.
- [51] The respondent noted that its February 1, 2018, EOB²⁸ addressed the fact that the applicant had not sent in an OCF-3 with respect to the subject accident and stated:
- “At this time we are unable to determine your eligibility for the Income Replacement Benefit as you have not submitted a completed Disability Certificate (OCF-3) with your application for specified benefit. Please be advised that no benefit is payable until we have received the completed disability certificate (OCF-3)”.
- [52] The respondent submitted that the applicant did not follow up on the February 1, 2018 EOB with respect to entitlement to an IRB for the subject accident, nor

²⁵ Explanation of benefits from the respondent to the applicant’s representative dated October 11, 2017.

²⁶ Cover letter accompanying the applicant’s OCF-1 for his subject accident from the applicant’s representative to the respondent dated January 31, 2018.

²⁷ Based on the respondent’s log notes of February 1, 2018, March 26, 2019, May 7, 2019, July 5, 2019, and August 7, 2019.

²⁸ Explanation of Benefits from the respondent to the applicant’s representative dated February 1, 2018.

contact the respondent regarding the errors and misunderstandings due to communications issues between the parties.

- [53] In terms of the applicant's argument about section 36 of the *Schedule*, the respondent relied on the matter of *JV v TD Insurance Meloche Monnex*²⁹, which found that an applicant who failed to submit a completed OCF-3 is not entitled to a specified benefit for any period before the completed OCF-3 was submitted. *JV* also found that a failure to submit an OCF-3 prevents an applicant from proceeding with an application to the Tribunal, which was found to be a "strict requirement" and to be done within 104 weeks of the accident. *JV* also found that the applicant bears the onus of showing entitlement to the benefit, and any consumer protection afforded by the *Schedule* does not discharge the applicant from his duties under the *Schedule*. The respondent also argued that its alleged awareness of the applicant's IRB claim is not relevant to this discussion, as this is not the test of determining if a valid OCF-3 was submitted.
- [54] The respondent submitted that the failure to submit a completed OCF-3 is confirmed by the matter of *CG v Pembridge Insurance Company*³⁰, where the Tribunal found that an applicant's failure to submit an OCF-3 within 104 weeks of the accident barred them from pursuing an IRB. Again, the Tribunal found that the onus is on the applicant to ensure that a completed OCF-3 is submitted and completed before entitlement to the IRB starts.
- [55] With respect to *Smith v. Intact Insurance Company*³¹, the respondent submitted that the Tribunal has found that an applicant cannot advance a claim for an IRB if he has failed to file his OCF-1 and OCF-3, as the jurisdiction of the Tribunal is that of appeal, and no appeal can begin without an initial application. Therefore, the respondent submitted the applicant's arguments should be afforded little
- [56] In terms of *MM. vs. Royal & Sun Alliance Insurance Company of Canada-007290/AABS*³², the respondent submitted this matter should be afforded little consideration, as the issue in dispute was a limitations issue, which is not the situation in the subject matter. The respondent reminded the Tribunal that there is no issue of limitations as the applicant failed to provide an OCF-3.

²⁹ *JV v TD Insurance Meloche Monnex*, 2019 CanLII 110091 (ON LAT) at para.10., 30 and 31.

³⁰ *CG v Pembridge Insurance Company*, 2020 CanLII 51276 (ON LAT) at paras. 6, and 11.

³¹ *Smith v. Intact Insurance Company*, 2021 CanLII 28712 (ON LAT) with no specific paragraph referenced.

³² *MM. vs. Royal & Sun Alliance Insurance Company of Canada-007290/AABS*, 2020 CanLII 101834 (ON LAT) at para. 19.

- [57] As for the matter of *Snagg. v Certas Home and Auto Insurance Company*³³, the respondent submitted this matter was also not related to the subject accident, as *Snagg* dealt with an OCF-3 that was submitted but had issues with respect to entitlement to a non-earner benefit, which is highly distinguishable from the subject matter, where no OCF-3 was submitted.
- [58] In terms of Mr. Makaronet's affidavit, the respondent submitted it should be afforded little weight because it is not supported by evidence and contains mostly opinions, arguments and speculation. The respondent submitted the affidavit offered little information, as Mr. Makaronet's is not the author of the letter from September 28, 2017, and therefore, he has no information with respect to the intention of the author's meaning, nor that of the author of the OCF-3.
- [59] The respondent submitted that since the applicant has not submitted an OCF-3 or his subject accident, his application for an IRB must be dismissed.
- [60] In terms of the applicant's arguments that he tried to notify the respondent of the circumstances giving rise to the IRB, the respondent submitted that the applicant's failure to submit an OCF-3 for the subject accident prevents him from advancing this claim. The respondent argued that no matter how many pages of clinical notes and records were provided for the applicant, he cannot advance an IRB claim because he did not submit an OCF-3.
- [61] As for the applicant's arguments with respect to section 32(6) of the *Schedule*, the respondent argued that this obligation is not relevant as section 32(6)'s obligation attaches to an application, meaning an OCF-1, and not OCF-3. Section 36(2) also states that an OCF-3 must be submitted with the OCF-1 based on section 32. Moreover, based on a plain language reading of these sections, the respondent submitted that had this been contemplated to apply to OCF-3s, it would have explicitly said this.
- [62] Instead, the respondent submitted that based on the matter of *S.B. v Allstate Insurance*³⁴, where the Tribunal found that section 36(2) of the *Schedule* attaches the onus to the applicant to ensure that the required form, the OCF-3, is completed and submitted prior to entitlement.

³³ *Snagg. v Certas Home and Auto Insurance Company*, 2021 CanLII 60477 (ON LAT).

³⁴ *S.B. v Allstate Insurance*, 2019 CanLII 119725 (ON LAT) at para. 19.

ANALYSIS

- [63] I find that the applicant is barred from proceeding with his application for an IRB because he failed to comply with section 55(1) of the *Schedule* for the following reasons:
- [64] After reviewing the submissions and evidence from the parties, I agreed that there were clear communication issues related to this claim. However, these issues appear to be linked to the applicant's former representative, as demonstrated by the issues with the applicant's OCF-3 and letter of September 11, 2017.
- [65] After reviewing the applicant's OCF-3 and the letter that withdrew the OCF-3 of September 28, 2017, I disagreed that the OCF-3 shows it is related to both accidents on its face. Due to the contradictory information, meaning the claim number for the previous accident and the date of the accident being the subject accident, I disagreed that the intention of the OCF-3 was obvious. I find that the applicant's evidence and arguments were often contradictory and difficult to understand.
- [66] Instead, I find that the OCF-3 was unclear as to which accident it related to, as it contained information related to both of the applicant's accidents. Unfortunately, the applicant did not clarify or amend his OCF-3 but instead chose to withdraw his unclear OCF-3. He also did not submit a subsequent OCF-3 with respect to the subject accident. Therefore, he cannot proceed with his application.
- [67] After carefully reviewing the applicant's letter withdrawing his OCF-3, I agreed with the respondent's argument that the applicant failed to qualify or specify that this withdrawal was in relation to his previous accident and that he intended to use his unclear OCF-3 in relation to the subject accident.
- [68] This position was also supported by the cover letter to the applicant's OCF-1 for the subject accident, which stated that the applicant's OCF-3 in relation to the subject accident was "to follow" by the adjuster's log notes. Based on this logic, the applicant admitted he had not provided an OCF-3 for the subject accident as of the date of the faxing of the OCF-1.
- [69] I agreed that Mr. Makaronet's affidavit was of limited value since it was not supported by evidence, nor was Mr. Makaronet the author of the disputed letters between the parties. Therefore, I afforded it little weight.

- [70] I agreed that the matter of *Smith v. Co-operators General Insurance Co* ensures that one of the main objectives of the *Schedule* is consumer protection law and that *Smith v. Intact Insurance Company* ensures that respondents communicate in a clear way to ensure applicants understand their entitlement to benefits.
- [71] However, I disagreed with the applicant's argument that the respondent failed to notify him that his OCF-3 for the subject accident was outstanding. Instead, I found that the applicant did not submit an OCF-3 in relation to the subject accident. I found the applicant's cover letter from January 31, 2018, which accompanied his OCF-1 for the subject accident, specifically addressed the fact that not only had the applicant not filed an OCF-3 in relation to the subject accident, but that said OCF-3 was to follow, and never did.
- [72] Furthermore, the applicant failed to address the fact that the respondent's EOB of February 1, 2018, unambiguously stated: "At this time we are unable to determine your eligibility for the Income Replacement Benefit as you have not submitted a completed Disability Certificate (OCF-3) with your application for specified benefit. Please be advised that no benefit is payable until we have received the completed disability certificate (OCF-3)". I find that this fulfils the obligation of section 32(6) of the *Schedule*, as it notified the applicant of his outstanding documentation to proceed with his application for specified benefits.
- [73] As for the obligation to follow up with the respondent based on its February 1, 2018, EOB, which notified the applicant that he had not submitted an OCF-3, I was persuaded by the matter of *S.B. v Allstate Insurance*³⁵; Similar to the subject matter, *S.B.* addressed if an OCF-3 had been filed in relation to an accident and squarely placed the onus of section 36(2) on the applicant to ensure that the required OF-3 is properly submitted and completed before entitled to a specified benefit begins.
- [74] I also agreed with the respondent's argument that the applicant providing clinical notes and records may notify the respondent that the applicant was involved in an accident but does not directly speak to his abilities, in the same manner, as an OCF-3 would. I also agreed that clinical notes and records cannot fulfil the obligation to submit an OCF-3 and was not persuaded by the applicant's position in this regard. I also found the matter of *S.B. v Allstate Insurance*³⁶ to be persuasive, as it addressed a very similar preliminary issue involving an applicant who allegedly did not submit an OCF-3.

³⁵ *S.B. v Allstate Insurance*, 2019 CanLII 119725 (ON LAT) at para. 19.

³⁶ *Ibid.*

- [75] I did not find the matter of *Smith v. Intact Insurance Company*³⁷ to be persuasive and agreed with the respondent's submission that this matter was of little relevance, as it did not address the issue of the applicant advancing an application for an IRB without having submitted an OCF-3. I also found that the respondent provided the applicant with clear communications in its EOB of February 1, 2018, of any and all outstanding documents the applicant was required to provide.
- [76] In terms of the matter of *MM vs. Royal & Sun Alliance Insurance Company of Canada-007290/AABS*³⁸, I also agreed that this matter was of little relevance, as it addressed issues with extending the limitations period and not allowing an applicant to proceed with an application for an IRB without an OCF-3.
- [77] In terms of section 32(6) and *Snagg. v Certas Home and Auto Insurance Company*³⁹, I found this argument to be unpersuasive, as the subject of *Snagg* addressed issues with entitlement to a non-earner benefit despite the applicant's OCF-3 stating they did not have a complete inability and has little to do with the subject matter at hand.
- [78] In terms of the applicant's submission that he did not receive an OCF-10, I found this to be of little relevance; this submission was not supported by evidence, such as proactive communications from the applicant's representative, nor did this fact actually impact the issue before the Tribunal. The issue before the Tribunal relates to the applicant providing the respondent with an OCF-3. The applicant did not communicate how the issue with his OCF-10 impacted or prejudiced the application or how said issue applies to the matter at hand.
- [79] I also found the applicant's arguments with respect to section 34 of the *Schedule* were unpersuasive, as the issue before the Tribunal was not one of timelines or limitations, but rather of procedure, and the applicant's failure to follow it. Even if the Tribunal waived the limitations period, this does not correct the fact that the applicant's OCF-3 is still outstanding.
- [80] This interpretation of the *Schedule* is supported by the matter *JV v TD Insurance Meloche Monnex*⁴⁰, and therefore, I agreed to adopt it. Therefore, as I have

³⁷ *Smith v. Intact Insurance Company*, 2021 CanLII 28712 (ON LAT) with no specific paragraph referenced.

³⁸ *MM vs. Royal & Sun Alliance Insurance Company of Canada-007290/AABS*, 2020 CanLII 101834 (ON LAT) at para. 19.

³⁹ *Snagg. v Certas Home and Auto Insurance Company*, 2021 CanLII 60477 (ON LAT) at para.

⁴⁰ *JV v TD Insurance Meloche Monnex*, 2019 CanLII 110091 (ON LAT) at paras. 10, 30 and 31.

found that the applicant has not submitted a completed OCF-3, he may not proceed with his application for an IRB for the subject accident.

- [81] In terms of the applicant's submissions regarding section 55(1)(1) of the *Schedule*, though I did consider them, I agreed with the respondent's arguments that since the applicant failed to submit an OCF-3 for the subject accident, he is barred from proceeding with his application for an IRB.

CONCLUSION AND ORDER

- [82] The applicant is barred from proceeding with his application for an income replacement benefit as he failed to notify the respondent of the circumstances giving rise to the claim for said benefit pursuant to section 55(1) of the *Schedule*.

Released: December 14, 2022

**Stephanie Kepman
Adjudicator**