



## Can an Applicant Claim Special Awards in a LAT Application?

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The new dispute resolution system through the Licence Appeal Tribunal (LAT) continues to be unfamiliar territory for the insurance industry, even though it has been almost two years since the switch from the Financial Services Commission of Ontario (FSCO). There continues to be a number of uncertainties regarding how accident benefits will be handled, including applications involving claims for special awards.

The jurisdiction for a special award during the FSCO-era originated from s.282(10) of the old *Insurance Act*<sup>1</sup>. The jurisdiction for the LAT, outlined in s.280 of the current *Insurance Act*<sup>2</sup> (*Act*), is silent on special awards. Though s.282(10) was revoked in the switch, s.10 of Regulation 664<sup>3</sup> is almost identical. Section 10 of Regulation 664 provides that if the LAT finds that an insurer has unreasonably withheld or delayed payments, the LAT has the discretion to award up to 50% of the amount that the person is entitled to at the time of the award (plus 2% interest)<sup>4</sup>.

On the face of s.10 of Regulation 664, it appears that it is possible to claim special awards in a LAT application. The LAT actually confirmed this in the August 2017 decision of *16-002779 v. BelairDirect Insurance*<sup>5</sup> where, for the first time, the LAT granted a special award to a claimant. In *BelairDirect Insurance*, the adjudicator awarded 30% of the claimant's

entitlement to income replacement benefits as a special award. The adjudicator, however, did not provide a detailed analysis of section 10 of Regulation 664, nor did the adjudicator discuss whether the old FSCO analysis would apply to LAT decisions. In September and November of 2017, the LAT granted special awards in two more decisions, confirming a willingness to apply Regulation 664<sup>6</sup>. These decisions, unfortunately, shed no further light on the test to be met by an applicant or how to defend such a claim by an insurance company.

Given the similarity between the wording of s.282(10) and s.10 of Regulation 644, the precedents applying the test under s.282(10) by FSCO may provide insight into what the LAT is likely to use as the test under s.10 of Regulation 664. In particular, the leading case of *Persofsky v. Liberty Mutual Insurance Co.*<sup>7</sup> sheds light on the adjudicator's decision-making process in granting a special award. The use of FSCO precedents has already been seen in some LAT decisions, such as *16-000897 v. Unifund Assurance Company*<sup>8</sup>.

Still, the authority of Regulation 664 is not clear. The authority to make regulations must be expressly found in an *Act*. After reviewing the *Act*, it may be possible that sections 121(1) 26 or 280(6) below serve this purpose.

**121.(1)** The Lieutenant Governor in Council may make regulations,

1 *Insurance Act*, R.S.O. 1990, c. I.8, historical version at s.282(10), online: <<https://www.ontario.ca/laws/statute/90i08/v30#BK324>>.

2 *Insurance Act*, R.S.O. 1990, c. I.8.

3 R.R.O. 1990, Reg. 664: Automobile Insurance under the *Insurance Act*, R.S.O. 1990, c. I.8.

4 *Ibid.*

5 *16-002779 v. BelairDirect Insurance*, 2017 CarswellOnt 16477 (Ontario Licence Appeal Tribunal).

6 *16-002861 v. Aviva Insurance Co.*, 2017 CarswellOnt 18786 (Ontario Licence Appeal Tribunal); *16-001698 v. Northbridge General Insurance*, 2017 CarswellOnt 18136 (Ontario Licence Appeal Tribunal).

7 *Persofsky v. Liberty Mutual Insurance Co.*, 2003 CarswellOnt 6359, [2003] O.F.S.C.I.D. No. 11.

8 *16-000897 v. Unifund Assurance Company*, 2017 CarswellOnt 10927, (Ontario Licence Appeal Tribunal).

26. governing proceedings before the Licence Appeal Tribunal under section 280, including imposing time limits or limitation periods

**280(6)** Without limiting what else the regulations may provide for and govern, the regulations may provide for and govern the following:

1. Orders, including interim orders, to pay costs, including orders requiring a person representing a party to pay costs personally.
2. Orders, including interim orders, to pay amounts even if those amounts are not costs or amounts to which a party is entitled under the Statutory Accident Benefits Schedule.

However, section 121.(1)26 of the *Act* is extremely broad and ambiguous. Conversely, section 280(6) appears too narrow to capture Regulation 664. Additionally, there does not seem to be a LAT decision that explicitly connects the authority of section 10 of Regulation 664 to the *Act*.

So, is this simply an oversight? Adjudicators derive their authority from a statute and do not have the comparable power of a judge. If the statute does not support the right to grant a special award, then there is a gap in the legislation. Insurers that are on the wrong side of a special award decision may wish to consider an appeal to the Divisional Court by way of judicial review to have the matter decided.

Currently, s.10 of Regulation 664 has yet to be challenged and LAT adjudicators continually entertain claims for special awards stating Regulation 664 as the foundation for such claims. In view of this, it seems to be business as usual when it comes to special awards in the world of accident benefits disputes.

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