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: 2018-03-09
Tribunal File Number: 17-002122/AABS
Case Name: 17-002122 v Respondent

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.

And in the matter of a preliminary issue brought by the respondent seeking a dismissal of the Application for reinstatement of an income replacement benefit as statute barred, the application for the reinstatement being brought more than two years after the denial.

Between:

M.T.G.

Applicant

and

Aviva General Insurance (formerly RBC General Insurance)

Respondent

DECISION

ADJUDICATOR: **Ruth Gottfried**

APPEARANCES:

For the Applicant:	Joe Kositsky, Counsel, Reybroek Barristers
For the Applicant's Lawyers:	Jillian Van Allen, Counsel, Brown & Partners LLP
For the Respondent:	Mai Nguyen, Counsel, Beard Winter LLP

Preliminary Issue Heard In Writing: September 13, 2017

BACKGROUND:

[1] The applicant was injured as a result of a motor vehicle accident on August 4, 2014 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").

[2] The applicant brought an application before the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") and a case conference was convened on July 5, 2017. The applicant did not attend the case conference. A case conference resumption was held on July 14, 2017 and all parties attended.

[3] At the time of the accident, the applicant was collecting employment insurance benefits (EI). Prior to receiving EI he was a general labourer/roofer at a construction company. He received EI until December 2014. In an OCF-1 dated August 25, 2014, the applicant made an application to the respondent (Aviva) for accident benefits, including income replacement benefits (IRB(s)). These facts are not in dispute.

[4] Aviva states that it experienced some delay in receiving employment information from the applicant, and finally determined the quantum of IRB at $223.94 weekly.

[5] The issues to be discussed at the case conference resumption were agreed to be:

a. Is the applicant entitled to an income replacement benefit (IRB), quantum to be determined, from February 12, 2015 to present and ongoing?

b. Is the applicant precluded from applying for an IRB, as the application was not commenced within two years after the insurer's refusal to pay the amount claimed?

c. Is the applicant entitled to a medical benefit for psychological services in the amount of $1,795.77 ($3,841.09 less $2,045.32 approved) as recommended by Dr. Romeo Vitelli in a treatment plan (OCF-18) submitted to the respondent on September 9, 2016?

d. Is the applicant entitled to interest on any overdue payment of benefits?

[6] At the case conference resumption, Aviva requested a preliminary hearing in writing on the following issues:

a. Is the applicant's application with regard to an IRB statute barred?

b. Should the applicant's Tribunal proceeding as it relates to IRBs be dismissed without a hearing with expenses being paid to Aviva?

RESULT:

[7] The applicant is not precluded from applying for an IRB, as the application was commenced within the required limitation period.

[8] The applicant's Tribunal proceeding is to be continued at a case conference resumption before me to be held on a date and time that is agreeable to all parties, to be determined on release on this decision.

[9] Expenses will not be paid to Aviva.

ANALYSIS:

Receipt of Correspondence:

[10] Aviva submits that it sent a letter dated February 10, 2015 (Letter 1) to the applicant with a copy to his counsel (Reybroek). In this letter Aviva advised the applicant that an insurer's examination report of January 2015 provided by a physiotherapist and a general practitioner indicated that he did not suffer a substantial inability to perform the essential tasks of his pre-accident employment and he would no longer be entitled to receive an IRB effective February 11, 2015.

[11] Aviva based its decision on medical reasons and enclosed the examination report as well as the applicant's rights to dispute.

[12] In his affidavit, the applicant says he does not recall receiving Letter 1. After being shown a copy of the letter to review, he acknowledges that the letter states that [he] would no longer be entitled to receive income replacement benefits on the basis of medical reports. He also states that the letter was addressed to him at the correct address and postal code, except it indicated P.O. Box #40 instead of Apartment 40.

[13] He further states that: "[i]f Aviva had sent me a letter in or around February 2015 terminating my income replacement benefits, *I would have forwarded a copy to my lawyers* at Reybroek Barristers as they were representing me at that time". [emphasis added]

[14] Aviva submits it sent another letter dated July 10, 2015 (Letter 2) to the applicant and his counsel, in which Aviva calculated the applicant's income replacement benefit from August 12, 2014 to February 11, 2015. By separate cover, Aviva sent the applicant a cheque for that period.

[15] The applicant admits receiving both Letter 2 and the cheque. However, he is silent on whether he advised his lawyer of receipt of either. Indeed, it would appear he had not, as in Reybroek's own affidavit, he submits that he did not receive a copy of Letter 1 until he asked Aviva for a copy on October 20, 2015. In fact, the log notes indicate Reybroek continued correspondence with Aviva after July 10, 2015 making several inquiries regarding IRB determination.

[16] Reybroek states that he did not receive information regarding Letter 2 until August 17, 2015.

[17] Under s.64(18) of the *Schedule* anything delivered by ordinary mail is deemed received on the fifth day after the document was mailed, absent evidence to the contrary.

[18] Clearly both the applicant and Reybroek advise that they did not get Letter 1. However, the applicant is definitive that if he had received such correspondence he would have forwarded a copy to his lawyer. However, we know that he received Letter 2 and a cheque under separate cover and did not advise his lawyer. As that is important information, which the applicant did not communicate, I have given less weight to his affidavit.

[19] Despite, the small discrepancy in the applicant's address, it appears he had no further difficulties in receiving correspondence, nor did his lawyers. According to the log notes attached to Reybroek's affidavit, both the applicant and his lawyer engaged in other correspondence with regard to various accident benefit issues. The only correspondence in dispute is the correspondence with regard to the stoppage of entitlement to IRBs.

[20] In support of the applicant's position, he raises the case of *Smith v. Cooperators*[1](*Smith*). In that case, the court determined that the notice of the stoppage of benefits was defective since it did not fully explain the applicant's options for dispute. Since the letter was defective, it could not be said that the limitation period had begun to run. However, in the case before me, neither party has argued that Letter 1 did not meet the criteria set out in the *Schedule*, only that it was not received by either the applicant or Reybroek. Therefore, I do not find Smith relevant.

[21] Additionally, Reybroek states in his affidavit[2]:

I have reviewed the Applicant's file and made inquiries of my law clerk, M.S., and I do verily believe that Aviva's letter of February 10, 2015 and its enclosures were not received by our office until it was faxed on October 22, 2015, as further discussed below. This is the only copy of the February 10, 2015 letter contained in the Applicant's file.

[22] Contrary to this statement is the fact, agreed to by both Aviva and Reybroek that Reybroek requested and subsequently received a complete copy of the accident benefit file on CD on March 23, 2015. The parties also agree that a copy of Letter 1 was included in the electronic material. Reybroek acknowledges in his responding affidavit of September 11, 2017 that although Letter 1 was in the electronic material, he had not had an opportunity to review it.

[1] *Smith v. Co-operators General Insurance*
[2] Affidavit of Todd Reybroek, August 23, 2017, para. 6

[23] I find it problematic that Reybroek has sworn an affidavit saying that Letter 1 was not in his office, when it had been there for almost seven months. It seems to indicate that no one had reviewed the CD file requested from and sent by Aviva, and Reybroek was only reminded of it when Aviva noted it in its submissions for this hearing.

[24] In support of his position, the applicant refers me to a Court of Appeal case, *Velasco v. North York Chevrolet Oldsmobile Ltd.*[3] (*Velasco*) that deals with discoverability. In that case, the Crown had sent the plaintiff an electronic brief of over 700 pages. The brief contained a license plate search that identified the owner of a vehicle. The plaintiff had already been provided with the ownership of the vehicle, unfortunately, it was incorrect.

[25] The Court of Appeal found, given the existing information at the time, it was unreasonable for the motion judge to conclude that the plaintiff's counsel should have treated the issue of vehicle ownership as a live issue upon receiving the Crown brief.[4]

[26] The Court of Appeal found the plaintiff's counsel acted with reasonable diligence in continuing to rely on the available information until the contrary actually came to their attention on review of the Crown brief in preparation for discovery.[5]

[27] *Velasco* can be distinguished in two ways from the case before me.

[28] First, in *Velasco*, plaintiff's counsel had his law clerk immediately review the documents when they arrived. The affidavits filed in the case before me, allude to the fact that the CD material was not reviewed at all.

[29] Second, the Court in *Velasco* determined that it was unreasonable to consider the car ownership a live issue. In the present case, if neither applicant nor Reybroek had received Letter 1, IRB entitlement was very much a live issue in March 2015, when the CD was sent.

Discoverability and Limitation Period:

[30] The onus of discoverability in this case rests on the applicant and Reybroek and the question is when did they know, or ought to have known that entitlement to IRB was stopped.

[31] Had Reybroek promptly reviewed the documents he requested, he would have been immediately aware of the date of denial.

[32] It seems to me that whether or not the applicant received Letter 1 there has been a serious lack of communication between the applicant and Reybroek. It appears

[3] 2011 ONCA 522
[4] *Velasco*, para 9
[5] *Velasco*, Ibid.

that not only did the applicant not communicate that he had received a letter from Aviva and cheque for an IRB, he did not contact Reybroek when he knew, or ought to have known, that no other IRB payments were made to him.

[33] After several inquiries by Reybroek, Aviva advised him on August 17, 2015 that on July 10, 2015 they had paid income replacement benefits to the applicant up to the stoppage date, from the period August 12, 2014 to February 11, 2015, and further that Aviva had notified both the applicant and Reybroek by letter dated February 10, 2015 that the applicant ceased to be entitled to an IRB.

[34] A plain reading of the August 17, 2015 letter seems to me to indicate that IRBs were no longer being paid. However, it took Reybroek two months to request a copy of Letter 1. Reybroek states that he received a copy of Letter 1 on October 22, 2015.

[35] Lastly, on the issue of the date of discoverability, the applicant, in his application to the Tribunal, indicates that he was paid IRBs to February 11, 2015. However, the date of denial in the application is July 10, 2015. This is the date of Letter 2 to the applicant regarding his cheque for his IRB. I believe that the receipt of Letter 2 and subsequent cheque was not communicated by the applicant to Reybroek, nor is it the date when Reybroek himself saw either Letter 1 or 2. It appears to be a strategic date chosen past the actual date of denial in order to start the "limitation clock" later in the year and thereby retroactively and unilaterally extend the limitation.

[36] The applicant argues that since he did not receive Letter 1 at all and his lawyer did not receive a copy until October 22, 2015, then the limitation period should expire on October 22, 2017.

[37] However, it is confirmed that Reybroek received a copy of Letter 1 on March 23, 2015 in the electronic material and received the information regarding stoppage on August 23, 2015.

[38] Since the applicant did not raise the issue of limitation at any time with Aviva, it seems that in an abundance of caution it would have been preferable to meet the February 11, 2017 limitation rather than try to determine the deadline with a preliminary issue at the case conference resumption of July 14, 2017.

[39] It is not unreasonable for Aviva to have relied on s.64(18)[6] of the *Schedule* when it sent Letters 1 and 2. Especially since its cheque was cashed by the applicant and the log notes indicate that there were other letters regarding benefits that the applicant received because he spoke with the adjuster after receiving them.

[6] In the absence of evidence to the contrary, a person is deemed to receive anything delivered by ordinary mail under clause (2) (d) on the fifth business day after the day the document is mailed in accordance with clause (2) (d). O. Reg. 34/10, s. 64 (18).

[40] However, s.64 does state “in the absence of evidence to the contrary”. I have already given less weight to the applicant’s affidavit as it appears he did not contact Reybroek even after receiving Letter 2 and a cheque.

[41] I do not find that Reybroek’s actions suffer from the same uncertainty. According to his affidavit, he wrote two letters to Aviva concerning IRBs on July 27, 2015 and another letter on August 11, 2015 requesting the status of the IRB. I believe that Reybroek would not have followed up with Aviva in three letters if he already had an answer to the question of the IRB owing to his client.

[42] As noted above, Aviva responded on August 17, 2015 advising Reybroek that it had paid IRBs on July 10, 2015 “up to the stoppage date” for the period of August 12, 2014 and February 11, 2015.

[43] I accept that it is impossible to have knowledge of things that you do not know, but the information contained in the August 17th letter should have been enough to trigger an immediate response by Reybroek as to the date of stoppage, which would have led him to the missing Letter 1.

[44] I therefore set the date of August 17, 2015 as the date of discoverability, when Reybroek knew or ought to have known that the IRB had been stopped by Aviva. The limitation period therefore, would have expired on August 16, 2017.

[45] As the application to the Tribunal was submitted on March 31, 2017, I find that the applicant commenced his application within the two years of the limitation period based on the discoverability of the stoppage information.

Application for FSCO Arbitration:

[46] In the alternative, the applicant submits that the limitation period for commencing a LAT application has not yet begun to run because FSCO did not issue a failed report of mediator.

[47] In light of my decision above, I am not addressing the merits of this alternate position.

Costs/Expenses:

[48] Aviva has requested that “expenses” be paid. The Tribunal does not issue rulings for payment of expenses that are in the nature of disbursements.

[49] If Aviva is referring to costs, the *Licence Appeal Tribunal Rules of Practice and Procedure* (the “Rules”) include a provision in Rule 19.1 for costs to be awarded when a party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.4 further sets out the requirements for a cost request, which must include the reasons for the request and the particulars of the alleged conduct.

[50] The respondent has not set out the reasons for the request or the particulars of the applicant's conduct which would attract a cost award as required by Rule 19. Since there is no basis or evidence of conduct that is unreasonable, frivolous, vexatious, or in bad faith before me, no costs will be awarded.

[51] The parties agreed to reconvene at a resumption case conference once my decision of the preliminary issue had been rendered, which is now the case.

ORDER:

[52] Pursuant to the authority vested in it under the provisions of the *Insurance Act*, the Tribunal directs that:

a. The applicant is not precluded from applying to the Tribunal for an IRB, as the application was commenced within the required limitation periods.

b. The applicant's Tribunal proceeding as it relates to IRBs is not dismissed.

c. Expenses will not be paid to Aviva.

d. The balance of the issues in the applicant's proceeding before the Tribunal will continue at a case conference resumption before me at a mutually agreeable date and time, to be determined by the parties once this decision is released.

[53] The Tribunal directs that the parties will be contacted with teleconference information for the case conference resumption.

[54] The issues at the case conference will be:

a. Is the applicant entitled to an income replacement benefit (IRB), quantum to be determined, from February 12, 2015 to present and ongoing?

b. Is the applicant entitled to a medical benefit for psychological services in the amount of $1,795.77 ($3,841.09 less $2,045.32 approved) as recommended by Dr. Romeo Vitelli in a treatment plan (OCF-18) submitted to the respondent on September 9, 2016?

c. Is the applicant entitled to interest on any overdue payment of benefits?

[55] If the parties reach an agreement on the issue(s) in dispute the applicant shall immediately advise the Tribunal.

Released: March 9, 2018

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Ruth Gottfried, Adjudicator