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Ontario

RECONSIDERATION DECISION

Before: Maureen Helt, Vice-Chair

Date: June 5, 2019

File: 17-005894/AABS

Case Name: Aviva Insurance Canada v. W.D.W.

Written Submissions by:

For the Applicant: Geoffrey Keating, Counsel

For the Respondent: Vincent Genova, Counsel

OVERVIEW

[1] This is a request for reconsideration made by the applicant (insurer) of a decision of the Licence Appeal Tribunal (Tribunal) dated May 4, 2018 (Decision). In the Decision the Tribunal considered an application made by the insurer for a repayment of income replacement benefits (IRBs) paid to the insured, W.D.W.

[2] In the Decision the Tribunal ordered that W.D.W. was entitled to IRBs in the amount of $400 per week from October 18, 2013 to date and further that the insurer was not entitled to repayment of $6,059.23 it paid to W.D.W. for IRBs in error.

[3] The focus of this reconsideration is whether the Tribunal erred in its failure to consider corporate losses when calculating the amount of IRBs payable to W.D.W. The insurer sought repayment of IRBs paid out to W.D.W. in error. The Tribunal found that the insurer was not entitled to repayment of $6,059.23 paid to W.D.W. for IRBs for the period October 11, 2013 and September 30, 2014, as there had been no overpayment of IRBs made to W.D.W. by the insurer.

[4] Pursuant to her authority under s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointment Act*, *2009,* S.O. 2009, c.33, Sched. 5, the Executive Chair delegated to me the responsibility to decide this reconsideration request.

RESULT

[5] I find the Tribunal made an error in law and in fact in its calculation of the quantum of IRBs payable to W.D.W. by the insurer such that it impacts the outcome of the Decision. More specifically, I find that the Tribunal erred in not deducting corporate losses sustained by OnCorp 9, (W.D.W.'s self—employment business), from W.D.W.'s pre-accident income of $52,995.00 from his farming business in determining the quantum of IRBs. As such, I find that the insurer is entitled to repayment of the $6059.23 paid to W.D.W. for IRBs for the period October 11, 2013 to September 30, 2014.

ANALYSIS

[6] The insurer requested a reconsideration of the Decision pursuant to rule 18.2 of the *Licence Appeal Tribunal*, *Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* (Rules).The relevant test for granting a reconsideration for a significant error is set out in in Rule 18.2(b) which allows the Tribunal to review a decision

for “significant errors”. This Rule does not mean that an adjudicator should reweigh all the evidence. Rather, the errors of fact or law much be significant such “that the Tribunal would likely have reached a different decision.”[1]

[7] The onus is on the party seeking reconsideration to establish the criteria set out in rule 18.2.

[8] In its responding submission to the reconsideration request W.D.W. argued that the insurer is now seeking to incorporate supplementary information and an argument that was not before the Tribunal at the first instance, in an attempt to re-argue the case and obtain a favourable result. Further W.D.W. states that the errors now raised by the insurer with respect to the alleged failure of the Tribunal to consider corporate losses in determining the amount of IRBs and failure to properly deduct post –accident income were determined by the Tribunal in the Decision.

[9] I find that the insurer is not raising new arguments or providing new evidence but rather it is making submissions on alleged errors made by the Tribunal.

BACKGROUND

[10] By way of background W.D.W., a self-employed person, was involved in a motor vehicle accident on October 11, 2013. He applied for and received various benefits from the insurer including payment for IRBs in September 2016 for the period between October 2013 and September 2014. The insurer sent W.D.W. a letter dated October 31, 2016 indicating that it reviewed its forensic accounting report, prepared by Matson Driscoll & Damico Ltd., Forensic Accountants (MDD) and that they had calculated the quantum of IRB payable to W.D.W. over the time period of October 18, 2013 to September 30, 2014 at $101.47 per week. The insurer issued payment to W.D.W. in the amount of $6,059.23.

[11] A further letter was sent by the insurer to W.D.W. dated July 5, 2017 wherein the insurer stated that they made an error in reading the report of their forensic accountants and the payment of $6,059. 23 was made in error. The weekly amount of $101.47 was the post-accident income amount that could be deducted from any weekly IRB payment and not the amount of IRB payable as previously stated.

[12] Pursuant to section 52 of the Schedule the insurer requested full repayment. The Tribunal recognized the requirement under section 52(3) of the Schedule which

[1] *Taylor v Aviva Canada Inc.*, 2018 ONSC 4472 at para 70

requires an insurer to notify the claimant, within twelve months of the overpayment, that it requires him or her to repay benefits. No argument was made that the notice requirement was not satisfied.

[13] In response to the insurer's letter dated July 5, 2017, W.D.W. retained its own forensic accounting firm, RSM Canada Consulting LP (RSM). In its letter dated January 9, 2018 RSM states "Accordingly, his income replacement benefits have been based on self-employment income from the farming business of $52,995 earned during 2012, per his 2012 income tax return". There is no consideration of the impact on corporate losses in the IRB calculation performed by RSM. As a result, the insurer filed an application with the Tribunal for a determination of its entitlement to the IRBs paid for the period October 11, 2013 to September 30, 2014 and W.D.W.'s obligation to repay the disputed amount.

[14] In the Decision, the Tribunal dismissed the insurer's request for repayment of IRBs in the amount of $6,059.23. The Tribunal determined that W.D.W. was entitled to IRBs in the amount of $400 weekly for the period of October 18, 2013 to date.

The Tribunal made an error in calculating IRBs and in its repayment finding.

[15] The Tribunal's analysis of repayment turned on the issue of whether or not W.D.W.'s pre-accident gross employment income was calculated correctly.[2] More specifically, the Tribunal found that there was no authority for the insurer's argument that it can deduct ONCorp 9's losses, which are corporate losses, from W.D.W.'s personal income. The Tribunal at para 37 (i) states "No such authority is expressly provided in the schedule." It is on this finding that I find an error has occurred.

[16] The insurer submits that the report of W.D.W.'s forensic accountants, RSM, was flawed for several reasons including the fact that it failed to note losses from ONCorp 9 for the last fiscal year (FY) pre-dating the accident. These losses which totalled $50,054.58, should be deducted from W.D.W.'s pre-accident income.

[17] W.D.W. disagreed and submitted that its last pre-accident FY was 2012 and therefore the IRBs should be calculated using the self-employment income of $52,995 earned during 2012 and reported in his 2012 income tax return.[3]

[2] Aviva Insurance Canada and WDW, 17-005894/AABS at para 18
[3] Para 12 Written submissions of the respondent.

W.D.W. also submitted that "corporate losses are immaterial in case where personal income is reported and taxed. They are not to be deducted."

[18] The Tribunal makes the following findings (Note: Aviva is the insurer):

(i) Aviva provides me with no authority for its contention that it can deduct ONCorp 9's losses – which are corporate losses – from W.D.W.

(ii) I agree with W.D.W.'s plain reading of s. 4(2)3 of the Schedule: W.D.W. as a self-employed person may designate his gross employment income from 2012 (the last FY of the business that ended before the accident) as his "gross annual employment income." That amount – uncontested – is $52,995.

(iii) I find no basis for Aviva's assertion that W.D.W. cannot use s. 4(2)3 of the Schedule because his income from self-employment is somehow excluded from the definition of "gross employment income" in s.4(1) of the Schedule, for the purposes of applying s. 4(2)1. Aviva provides none.

(iv) I find that the appropriate formula for determining W.D.W.'s IRB entitlement is:

1. Weekly base income in $37,096.50 (70% of farming income) Divided by 52 weeks = $713.39/week
2. W.D.W. had weekly earned income of $101.47 during the period in dispute:

   Total $713.39 – 101.47 + $611.92/week[4]

[19] In light of the above calculation the Tribunal found that as $400 is the prescribed maximum weekly IRB payable under the Schedule, the amount payable to W.D.W. is $400 per week and therefore the insurer is not entitled to any repayment of IRBs.

Failure to Consider Corporate Losses in Determining Quantum of IRBs

[20] The insurer submits that the Tribunal erred in concluding that the losses sustained by W.D.W.'s business (ONCorp 9) during the last taxation year pre-accident could not be deducted from W.D.W.'s personal income, for the purpose of calculating the amount of IRBs. The insurer submits that in calculating the quantum of IRBs the Tribunal concluded incorrectly that the insurer was able to

[4] Decision par 27.

make use of $52,995 in net farming income earned in the last fiscal year prior to the subject accident without accounting for the corporate losses of ONCorp 9.

[21] The question before me is whether the Tribunal applied the Schedule appropriately in its calculation. In this regard I note the following:

(i) The 2010 Schedule has created definitions of self-employed individuals (s 3(1)) and for gross income (s 4(1)). The changes also included changes in the calculation methodology (s 7(2)1(i)) for an IRB.

(ii) Specifically section 7(2)(i) sets out the methodology for the calculation of the weekly base amount and provides it is 70% of the amount, if any, by which the sum of the insured person's gross weekly employment income and weekly income from self-employment exceeds the amount of the insured person's weekly loss from self-employment, if the weekly income replacement benefit is for one of the first 104 weeks of disability.

[22] Based on the language above the losses from self-employment can be used to reduce the pre-accident employment income when calculating the insured's pre-accident gross income. This principle has been recognized the Divisional Court's decision in *Surani v. Perth Insurance Company* (2018) ONSC 7254 which upholds a decision of the Director Delegate in *Perth Insurance Company v. Salim Surani*[5].

[23] I find that it is helpful to set out the methodology for calculating IRB's as set out in the Director Delegate's decision in *Surani*.

[24] In *Surani*, the applicant, a pharmacist self-employed in a family pharmacy, claimed IRBs from her insurer under the Schedule.

[25] The Director Delegate was asked to review the calculation of IRBs and notes the following at paragraphs 40 & 41:

> 40 Section 7 sets out how to determine the amount of the payable IRB. Two important concepts are the "weekly base amount" and the payable IRB:

[5] Perth Insurance Company v. Salim Surani , 2017 Carswell, Ont 13620 David Evans Director Delegate Review of 2016 Carswel lOnt 3803, Anne Sone Member (F.S.C.O. Arb.), Tab E Applicant's Submissions

- Determine the "weekly base amount" in s. 7(2), which is 70% of employment and self-employment income that exceeds weekly loss from self-employment: both self-employment income and loss from self-employment are thus tied to the business income.

- Add back in 70 % of the amount of the insured person's weekly loss from self-employment incurred as a result of the accident, including loss from hiring a worker to replace the insured's active participation in the business: again, weekly loss from self-employment is tied to the business, and the insured's lack of active participation in the business is taken into account at this point.

- Subtract from the weekly base amount the total of all other income replacement assistance, if any, [as defined in s. 4(1)] for the particular week the benefit is payable.

- Determine the payable IRB by comparing the net weekly base amount and the weekly maximum (almost always $400, as in this case); the lesser amount is the payable IRB [s. 7(1)].

- Deduct post-accident income from the payable IRB.

41 Note that while weekly losses from self-employment are added to the weekly base amount, the payable IRB is capped at $400 (unless optional benefits were purchased), and any deduction for post-accident income is taken from the payable IRB and not the weekly base amount.

[26] Further on in the Surani decision the Director delegate confirms that not all provisions of the Income Tax Act (ITS) are to be incorporated automatically in the Schedule however, section 4(3) of the Schedule specifically references Part I of the ITA:

"(3) A self-employed person's weekly income or loss from self-employment at the time of the accident is the amount that would be 1/52 of the amount of the person's income or loss from the business for the last completed taxation year as determined in accordance with Part I of the *Income Tax Act* (Canada). "

[27] Section 9 (1) of the ITA states: "Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from the business or property. In paragraph 44 of Surani: "What matters for the purposes of the SABS is simply the profit of the business."

[28] The Divisional Court in its review of *Surani* stated at para 15:

> [15] Subsection 4(3) is found in the interpretation section relating to IRBs. It deals with the determination of pre-accident income or loss for the self-employed. It stipulates that this will be determined in accordance with Part I of the ITA. Part I deals with determining a person's income or loss from a business. Subsection 9(1) of the ITA provides that, subject to Part I, "a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.
>
> …
>
> [20] In sum, the Director's Delegate concluded that the overall structure of the SABS with respect to the entitlement to and calculation of IRBs for the self-employed focuses on the loss and profit of the business. In my view, that is a reasonable interpretation.

Interpretation of the Schedule

[29] In this case W.D.W. reported income of $52,995.00 but also losses of $50,054.58 from his self-employment through ONCorp 9 in the last FY. In the Decision the Adjudicator considered the definition of gross employment income from section 4(2)3 but failed to consider section 7 which clearly sets out the methodology for the calculation of the amount of weekly IRBs.

[30] The Decision confirms that W.D.W. was self-employed with respect to ONCorp 9 and as such, W.D.W., in the insurer's submission, must be considered as a "self-employed person" with respect to ONCorp 9.

[31] Section 4(2)3 sets out that if a person is self-employed for at least one year prior to the accident, the person may designate as his or her gross annual employment income the amount of his or her gross employment income during the last fiscal year of the business that ended on or before the day of the accident.

[32] Section 4(3) of the Schedule refers to a self-employed person's <u>weekly</u> income and loss from self-employment. Weekly loss is defined as at the time of an accident as 1/52 of the amount of the insured's loss from the business in the last completed taxation year as determined in accordance with Part I of the Income Tax Act.

[33] As set out above Section 7(2) (i) and (ii) and 2 set out the methodology of calculating weekly base amount as 70% of the pre-accident gross weekly

employment income and weekly self-employment income less the pre-accident weekly losses from self–employment.

[34] The weekly amount of IRB payable is then calculated as, pursuant to section 7(1), the lesser of the weekly base amount, as calculated under subsection 7(2) minus and any "other income replacement benefit assistance" or $400.

Calculation of IRBs

[35] Therefore under section 7(2) the calculation of the weekly base income is as follows:

$52,995.00 (gross employment income)
\- $50,054.58 (corporate losses of ONCorp 9)
= **$2,940.42**

Multiply by 70% equals $2,058.29

[36] This amount is then divided by 52 to result in a weekly base income of $39.58 per week of base income.

[37] After the accident, the insurer had weekly earned income of $101.47 during the period in dispute.

[38] Therefore the total is weekly base income of $39.58 less the weekly earned income of $101.47 which equals a negative amount. As such I find the total IRB payable to W.D.W. for the period between October 2013 and September 2014 to be zero.

[39] For the reasons set out above, I agree with the insurer that the Tribunal erred in failing to consider corporate losses of OnCorp 9 in the amount of $50,054.58 for the last taxation year prior to the accident when calculating the quantum of IRBs payable. I also find the amount of $101.47 per week should properly be deducted from the amount of weekly IRBs payable for the time period of October 11, 2013 to September 30, 2014.

[40] In light of my findings above I do not see a need to address the other grounds raised by the insurer in this reconsideration request.

CONCLUSION

[41] In accordance with Rule 18.2, I grant the request for reconsideration, and vary the decision and order to read that W.D.W. repay the amount of $6059.23 for IRBs paid out in error to the insurer.

Maureen Helt
Vice-Chair
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: June 5, 2019