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: 2018-05-03
Tribunal File Number: 17-005302/ABSS
Case Name: 17-005302 v Aviva Insurance Company of Canada

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:

S.W.

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **D. Gregory Flude**

APPEARANCES:

For the Applicant:	Alexei Antonov, counsel and Alina Kaganovich, student-at-law
For the Respondent:	Geoffrey Keating, counsel Han Nguyen, AB Specialist
Court Reporter:	Rose Uriega
HEARD In-Person:	**February 2, 2018**

OVERVIEW

[1] The applicant was injured in a motor vehicle accident on May 2, 2016. She applied to the respondent for an income replacement benefit pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the *"*Schedule*"*) for the period from May 9, 2016 until February 7, 2017 when she returned to work.

[2] At the hearing the respondent conceded that the impairments suffered by the applicant were of sufficient severity that she would meet the test for entitlement to an income replacement benefit. This concession rendered the need for medical evidence regarding the extent of the applicant's impairments unnecessary, so the doctors who were on standby to give evidence by telephone were advised that they would not be needed. I proceeded to hear evidence from the applicant.[1]

[3] The complicating factor in this case is the fact that the applicant was on maternity leave at the time of the accident. She was receiving both Employment Insurance maternity leave benefits (EI) and a top up from her employer such that her total income at the time of the accident was similar to her income when she was working full-time. The respondent's concession that the applicant's impairments were such that she would otherwise meet the test for an income replacement benefit meant that the balance of the hearing focussed on the right of the respondent to deduct the EI and top-up benefits from the applicant's income replacement benefit entitlement.

[4] The respondent also submitted that the applicant had available to her, but failed to apply for, a short/long-term disability benefit through her employer. The respondent takes the position that the applicant was obliged to apply for that benefit and that it is entitled to deduct 70% of the amount she would have received had she applied.

ISSUES

[5] The issues identified in the case conference order are:

a. Is the applicant entitled to receive an income replacement benefit in the amount of $400/week for the period from May 2, 2016 until March 27, 2017?

b. Is the respondent liable to pay a special award because it unreasonably

[1] It is the respondent's position that it has always conceded the applicant meets the test and I will address that position when I address costs. It is sufficient to say that the applicant was prepared to produce medical evidence of entitlement at the hearing and the need for such evidence was clearly rendered unnecessary by the respondent's opening statement.

denied payments to the applicant?

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

[6] As stated above, the respondent conceded entitlement to an income replacement benefit, so the actual issue before me is what amounts the respondent may deduct from the $400/week payment the applicant would otherwise be entitled to receive. The respondent argues that it is entitled to deduct 70% of "gross employment income" from amounts otherwise payable to the applicant and that includes 70% of the EI maternity benefits and the employer top up.[2] The applicant argues that her maternity benefit and top-up are not deductible and she should therefore receive the full amount of the IRB benefit.

[7] At the time of the accident, the applicant was on maternity leave from her employer. In addition to EI, she received a top-up payment from her employer so her total income was equal or close to her average pre-maternity leave income. If the respondent is successful, then the applicant would be entitled to nothing during the period of the top-up payment and a nominal amount thereafter while on maternity leave. If I also find that she should have applied for her short/long term disability, that nominal amount would, in all likelihood, be reduced to zero.

[8] I am of the view that the wording of the Schedule is clear and unequivocal. The respondent may deduct 70% of the EI and the employer top-up from the income replacement benefits payable to the applicant. I am not prepared to find the applicant is to be ascribed notional income from the short/long term disability payments. Despite alleging that such benefits may have been payable had the applicant applied for them, the respondent gave me no information regarding the quantum of the benefits in question, whether they were available to the applicant while on maternity leave, and the qualifying conditions for entitlement.

ANALYSIS

Deductibility of Maternity Leave Benefits

[9] The essential nature of the dispute between the parties is the manner in which maternity benefits are characterized. If I find that they are part of the definition of

[2] Section 7(3) of the Schedule states: The insurer may deduct from the amount of an income replacement benefit payable to an insured person,

(a) 70 per cent of any gross employment income received by the insured person as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit; and

(b) 70 per cent of any income from self-employment earned by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit.

"gross employment income,"[3] then the respondent may deduct 70%. If they fall within the definition of either a "temporary disability benefit" or "other income replacement assistance" [4] then the respondent is not entitled to deduct the EI maternity benefit as it is specifically excluded by the wording of the Schedule.

[10] Entitlement to an income replacement benefit is set out in s. 5 of the Schedule. That section requires the respondent to pay the applicant an income replacement benefit in the amount of 70% of her gross weekly employment income to a maximum of $400/week if she suffered a substantial inability to perform the essential tasks of her employment. The respondent concedes that the applicant meets the substantial inability test with respect to the period during which she seeks benefits and that she would qualify for the maximum rate of $400/week. The dispute between the parties is what amounts the respondent may deduct from that $400/week benefit payment.

[11] The applicant testified that she started maternity leave in February 2017. Her application for maternity leave stated that she intended to take the full year but in her evidence she stated that she always intended to return to work after approximately six months as she and her husband were looking to buy a house.

[12] She was paid $537.00 per week in EI. Her employment contract also included 25 weeks of top-up in an approximate amount of $670/week. Thus, during her maternity leave, for the first 25 weeks, her income remained largely unchanged from her full working income. Thereafter, subject to the respondent's position that she should have applied for short/long term disability payments, she received only EI. If the respondent may deduct 70% of $537.00 from her income replacement benefit she would be left with a small weekly entitlement.

[13] Section 7(3) of the Schedule permits the respondent to deduct 70% of gross employment income from the amount to be paid for an income replacement benefit. Gross employment income is defined in s. 4(3) as: "salary, wages and other remuneration from employment, including … benefits received under the *Employment Insurance Act* S.C. 1996, c.23." Clearly maternity leave benefits are payments under the *Employment Insurance Act*. Maternity benefits under the *Employment Insurance Act* are caught in this definition.

[14] There is other wording in s. 7(3) that the applicant relies on in support of her position that her maternity benefit and top-up are not deductible. The section requires that the gross employment income arise: "as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit." The applicant argues that she was unemployed at the time of the accident, that her EI was the result of contributions she made to

[3] Section 4 (1) definition of "gross employment income" specifically includes income from EI

[4] Section 47(3) excludes EI from temporary disability benefit and s. 4(1) also excludes it from "other income replacement assistance."

the employment insurance scheme and therefore the benefits were not the result of being employed. I find this argument flawed.

[15] Perhaps the most obvious flaw in the applicant's argument is the fact that EI is only available to persons who are employed at the time they begin their leave. Clearly EI becomes payable "as a result of being employed." I can find nothing in the Schedule to support the argument that because a person contributes to an income support plan while working, then such amounts are not deductible as gross employment income. The fact is that all income support plans are financed in some manner. Even where an employer pays the whole premium, the plan is part of an employee's remuneration package and the employee contributes by trading a lower wage increase for an increase in benefits.

[16] I have difficulty with the assertion that the applicant was unemployed at the time of the accident. I recognize that she was not working but her position was being held open for her to return to once she completed her maternity leave. She returned to her employment, as of right, notwithstanding that the actual position she might take up on her return was not the same as the position she vacated when she went on leave.

[17] The Applicant argues that s. 47(3) disallows the deduction of EI from income replacement benefits. Section 47(1) allows an insurer to deduct any "temporary disability benefit" in respect of "an impairment" sustained before the accident. Section 47(3) defines a "temporary disability benefit" and specifically excludes disability income received under the *Employment Insurance Act* for pre-accident impairments.

[18] "Impairment" is defined in s. 3 of the Schedule to be "a loss or abnormality of a psychological, physiological or anatomical structure or function." Thus a temporary disability benefit is a benefit that is payable because of the loss of a psychological, physiological or anatomical structure or function. For the applicant to succeed, I must find that EI to assist in childrearing is a temporary disability benefit paid because childrearing is an impairment. I am of the view that the literal wording and intent of the Schedule do not support such a finding.

[19] The respondent relies on two cases from the Financial Services Commission of Ontario in support of its position that it may deduct EI from an income replacement benefit: *Nelson v. State Farm Mutual Automobile Insurance Co.*[5] and *Veeran v. State Farm Mutual Automobile Insurance Co*.[6] The applicant argues that these cases are wrongly decided because they do not consider the impact of s. 47(3).[7]

[5] *Nelson v. State Farm Mutual Automobile Insurance Co.,* 2015 CarswellOnt11170
[6] *Veeran v. State Farm Mutual Automobile Insurance Co.,* 2016 CarswellOnt 10005
[7] S. 47 allows for the deduction of temporary disability payments with certain exceptions:

[20] The first to be decided was *Nelson*. The facts are not markedly different from the current facts. Ms. Nelson was on maternity leave at the time of the accident. She sought an income replacement benefit. State Farm argued that it was entitled to deduct 70% of the EI maternity benefit. The applicant argued that EI maternity benefits fell within the definition of "gross employment income" in s. 4(1) of the Schedule. She argued that it was also caught by the definition of "other income replacement assistance," a definition that specifically excluded "a benefit under the *Employment Insurance Act (Canada)*." In her view, there was a conflict between the two definitions in s. 4(1), a conflict that should be resolved in favour of the consumer.

[21] Arbitrator Conroy specifically rejected Ms. Nelson's argument. He found no conflict. I agree that the decision is cryptic but it appears that Arbitrator Conroy accepted State Farm's position that maternity leave is not unemployment and therefore EI maternity benefits fall within the definition of "gross employment income:" a position with which I agree.

[22] Arbitrator Tanaka applied *Nelson* in *Veeran*. Of interest on the current facts is that Ms. Veeran had a period during which she received maternity benefits and a period when she received disability income, both from EI. Without specifically addressing the impact of s. 47(3), Arbitrator Tanaka held that State Farm was entitled to deduct 70% of the EI maternity benefits but none of the disability benefit, which she referred to as "sick benefit."

[23] I am persuaded by the analysis in both *Nelson* and *Veeran* as far as it relates to EI maternity benefits. It is the only analysis that ensures that each reference to EI in the Schedule addresses a specific entitlement without rendering the other references inapplicable or superfluous. EI maternity benefits fall within the definition of gross employment income, that is: "salary, wages and other remuneration from employment, including fees and other remuneration for holding office, and any benefits received under the *Employment Insurance Act* (*Canada)*" Her income arises out of her employment. Other EI benefits cover disability or sickness and these benefits are not deductible from an income replacement benefit because they have been specifically excluded by s. 4(1) and s. 47(3).

---

47. (1) The insurer may deduct the following amounts from the amount payable to an insured person as an income replacement or non-earner benefit under this Regulation:
1. Any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.

(3) In this section, "temporary disability benefit" means,
(f) any other periodic temporary benefit paid under an income continuation benefit plan or law, other than,
(i) benefits under the *Employment Insurance Act* (Canada),

DATE OF COMMENCEMENT OF THE BENEFIT

[24] The respondent argues that it is not obliged to pay the applicant an income replacement benefit until the date that it received the applicant's election of an income replacement benefit rather than a non-earner benefit. It relies on my decision in *17-002496 v. Aviva Insurance Company* ("*2496*").[8] I find the respondent has misinterpreted this decision.

[25] The issue in *2496* concerned the question of whether the application to the Tribunal was a nullity since the applicant had denied the respondent the right to make a decision. In the absence of decision to deny a benefit, there was no right to appeal to the Tribunal. At the core of the decision was the applicant's failure to elect which of an income replacement benefit or a non-earner benefit she was seeking until after she had applied to the Tribunal. Applying the provisions of the *Insurance Act* giving the Tribunal authority to resolve disputes, I held that there was no dispute between the parties as of the date of the filing of the application as the insurer, Aviva, had not yet issued a decision regarding entitlement. In the absence of a dispute, the Tribunal had no jurisdiction. The matter is currently under appeal to the Divisional Court.

[26] I do not accept the respondent's position that steps taken in the normal course of adjusting a file without undue delay work to deprive the applicant of entitlement to an income replacement benefit. The applicant filed an OCF-3 that indicated potential entitlement to both an income replacement benefit and a non-earner benefit. This form triggered an obligation on the respondent to put the applicant to her election. She duly made that election. She did not maintain her right to both benefits until after her application to this Tribunal, as was the case in *2496*. Her delay was not inordinate.

[27] I find that the applicant's entitlement commenced one week after the accident, that is, from May 9, 2016. The Schedule provides entitlement to an income replacement benefit one week after the accident date. To accept the respondent's position, that the reasonable time involved in gathering together and completing documents denies an applicant entitlement to a benefit, would render the one week deductible period meaningless. It is functionally impossible to complete all of the steps necessary to successfully apply for an income replacement benefit and make an election within one week. The *2496* case is distinguishable because firstly it addresses the jurisdiction of this Tribunal, not regular entitlement to benefits, and secondly, the delay in that case was inordinate, a matter of five years or so.

[28] Having found the applicant's entitlement commenced one week after the accident, I also find that the respondent was entitled to deduct 70% of the total of

[8] *17-002496 v. Aviva Insurance Company* OLATD released December 12, 2017

the EI benefit plus the employer top up for as long as the top up was paid.

SPECIAL AWARD

[29] Section 10 of O/Reg. 664[9] gives me the ability to make an award of up to 50% of any amounts outstanding together with interest on outstanding amounts at 2% per month compounded monthly if I find that the respondent has unreasonably withheld or delayed payment. It is commonly referred to as a "special award" as that was the term used in an earlier version of the regulation. The applicant asks me to make an award in this case. I decline to do so.

[30] The prerequisite to relief under s. 10 is that the respondent has unreasonably withheld or delayed payments. Given the issues in dispute in this hearing and my findings of the amounts the respondent may deduct from the applicant's entitlement, it cannot be said that the respondent has unreasonably withheld or delayed payment of any sums. Of three potential deductions, EI, employer's top-up, and imputed short/long term disability entitlement, I have found in favour of the respondent on two of those issues.

[31] I did not find that the respondent was entitled to deduct an imputed amount for the short/long term disability entitlement. If I am to make an award for the failure to pay from the expiry of the employer top-up period, I must find that the respondent not only withheld or delayed that payment, but did so unreasonably. On all of the facts of this case, I decline to make that finding. I find that the respondent's position on the imputed income was not an unreasonable one to take. It was not without merit, notwithstanding that I found that I had insufficient evidence to find in the respondent's favour. The applicant is not entitled to an award under O/Reg. 664 for the non-payment of an IRB.

INTEREST

[32] Section 51 of the Schedule provides a code for the payment of interest on overdue amounts. It does not give me discretion to vary the interest payable. As noted above, the applicant is entitled to payment from the date of the termination of the employer top-up. Equally, she is entitled to interest on those amounts as they became due until the date of payment.

COSTS

[33] The applicant has asked for costs. She takes the position that the respondent's refusal to notify her that her entitlement to an income replacement benefit was not in issue until the start of the hearing put her to great expense in terms of preparation for the hearing and having her doctor witnesses available. The

[9] R.R.O. 1990, REGULATION 664

respondent argues that it always was its position that the applicant met the test for an income replacement benefit and it cannot explain why the applicant chose to lead medical evidence at the hearing.

[34] I find the respondent's position disingenuous. Its actions were unreasonable and vexatious and the applicant is entitled to an award of costs.

[35] The respondent relies on its letter to the applicant dated July 20, 2016 for the proposition that the applicant's entitlement to an income replacement benefit was never in dispute. The letter acknowledges receipt of the applicant's documents and advises the applicant that she is eligible for an income replacement benefit and that she is not eligible for other benefits. Thereafter, throughout the application to this Tribunal until the commencement of the hearing, the respondent took the position that the applicant was not entitled to an income replacement benefit.

[36] The Notice of Application to the Tribunal was received on August 16, 2017. The Response was received by the Tribunal on September 5. In the section relating to income replacement benefits the respondent states: "the applicant has not suffered a substantial inability to carry out the tasks of her pre-accident employment as a result of the accident." This statement is completely at odds with the July 20, 2016 letter and the respondent's submission at the hearing that it never disputed the applicant's entitlement to an income replacement benefit.

[37] The applicant and the respondent attended a case conference on November 3, 2017. The parties discussed the issues and the procedure for the hearing. The respondent agreed that the issue in dispute with respect to the hearing was the applicant's entitlement to an income replacement benefit rather than the quantum of that benefit. This agreement was reduced to a case conference order that was released to the parties on November 16, 2017.

[38] The case conference order also discusses the time needed for the hearing and the applicant's intention to call two medical witnesses. Nothing in the order indicates that the respondent had conceded entitlement to an income replacement benefit and, thus, medical witnesses were unnecessary. I was shown no communication from the respondent between the case conference in early November 2017 and the hearing on February 2, 2018 where the respondent corrected its position and made it clear that it was disputing only quantum and not entitlement. In light of all of the above, I accept the applicant's position that she was taken by surprise on the morning of the hearing to discover that the respondent was conceding entitlement and she did not have to call medical evidence.

[39] The issues before the Tribunal are defined by the parties in the Notice of Application for Dispute Resolution and the Response by an Insurance Company,

not in the general body of correspondence that makes up the file. The respondent put the applicant's entitlement to an income replacement benefit squarely in issue and took no steps before the hearing to clarify its position. I find this behaviour to be unreasonable and vexatious.

[40] In arriving at this decision, I am cognizant of the fact that it is good policy and practice to encourage parties to narrow the issues or identify and remove issues not in dispute. I recognize that litigation often presents a moving target and positions change as evidence emerges. My difficulty in the current matter and the reason why I find the respondent's behaviour both unreasonable and vexatious, is that it argues that it has not disputed entitlement since July 2016. Despite this, it has embarked on a course of behaviour that had the effect of representing to the applicant and this Tribunal that entitlement was in dispute.

[41] My ability to award costs is set out in both s. 17.1 of the *Statutory Powers Procedure Act*, R.S.O. chap S. 22 and in the Tribunal's *Licence Appeal Tribunal Rules of Practice and Procedure, Version I (April 1, 2016)*(the Rules). Section 17.1 permits me to make an award of costs if the Tribunal has a costs rule and where a party to a proceeding has acted unreasonably, frivolously, vexatiously, or their actions are an abuse of process.

[42] The applicable Tribunal costs rule set out in s. 19 of the Rules echoes the wording of s 17.1 and adds the proviso that the impugned behaviour must occur in a proceeding. As noted above, starting with the filing of the Response through to the morning of the hearing, the respondent maintained a position that the applicant's medical entitlement was in issue. I find that the respondent acted unreasonably and vexatiously in a proceeding sufficient to attract an award of costs.

[43] Of note is the fact that the respondent was successful in the application. Where the stringent parameters for an award of costs set out in the Rules are met, the usual course would be for the award to be made in favour of the successful party. The Rules and the *Statutory Powers Procedure Act* reflect a different policy. By incorporating the behaviour of a party in a proceeding as a trigger for an award of costs, the section makes behaviour the focus and not success in the litigation. Thus, a successful, but unreasonable party may be subject to a costs award.

[44] The Rules are silent as to the quantum of a costs award but I note that Tribunal practice has been to award modest costs.[10] In my view, the hearing could have been shortened significantly had the respondent made clear its position earlier in the litigation.

[45] The applicant is seeking $7,000 in costs. She relies on the Tribunal's decision in

[10] *16-000433 v Wawanesa Mutual Insurance Company*, 2017 CanLII 9821 (ON LAT)

16-000433 v. Wawanesa.[11] In that case, the applicant was seeking $1,000 in costs. In setting out broad policy considerations for an award of costs, the adjudicator stated:

> The applicant requested costs in the amount of $1,000.00. I find this amount is not proportional to the specific behavior. The award should be set high enough to discourage the conduct from occurring again. Accordingly, the respondent is ordered to pay costs of $250.00 to the applicant.

[46] I am of the view that in this case, an award of $1,000 in costs is proportional to the respondent's behaviour. Because of that behaviour, the applicant was required to summon two doctors and have them on standby and bring a motion to allow the doctors to testify by telephone. Of significance is the fact that the question of the amounts to be deducted from the income replacement benefit was entirely a legal issue best addressed by an agreed statement of facts and written submissions. An in-person hearing was unnecessary in this case.

ORDER

[47] Having considered the evidence and the submissions of the parties, I order:

a. The applicant's entitlement to an income replacement benefit in the amount of $400 per week commenced on May 9, 2016 and continued until she returned to work on February 7, 2017.

b. The respondent is entitled to deduct 70% of Employment Insurance maternity benefits and employer top-up during the period the top-up was paid leaving the sum of $0 payable while the applicant received the top-up.

c. Following the termination of the employer top-up, the applicant is entitled to the income replacement benefit less 70% for EI to February 7, 2017 with no deduction for imputed entitlement to a short/long term disability payment.

d. The applicant is entitled to interest on each payment as it became due pursuant to s. 51 of the Schedule.

e. The respondent shall pay the applicant $1,000 in costs.

f. If the parties cannot agree on the amount of outstanding interest or the

[11] There was no disagreement between the parties on the key facts: the applicant was on maternity leave, she received EI maternity benefits and a top-up from her employer. The respondent led no evidence about the short/long term disability benefits other than to point out the applicant may qualify for them.

date when the employer top-up ceased, they may contact the Tribunal and I will set up a written hearing to address these matters.

Released: May 3, 2018

_____

D. Gregory Flude, Vice-Chair