

**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**

Citation: **Kavitha Thevathas vs. Aviva Canada, 2019 ONLAT 18-004768/AABS**

Date: June 18, 2019

File Number: 18-004768/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:

KT

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

PANEL: Christopher A. Ferguson, Adjudicator

APPEARANCES:

For the Applicant: Ryan O'Connor

For the Respondent: Geoffrey Keating

HEARD: In Writing on: January 21, 2019

REASONS FOR DECISION

OVERVIEW

- [1] The applicant, KT, was involved in a motor vehicle accident on September 8, 2017. As a result, she sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule"). She applied for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") when the respondent, "Aviva", denied her claim.
- [2] KT received income replacement benefits (IRBs) from Aviva, which paid her \$400.00 weekly from October 26 to November 23, 2017. A payment of \$111.83 was made to her on November 20, 2017. Aviva then terminated the IRBs in a letter dated December 4, 2017, after KT failed to comply with a request for bank records made under s.33 of the Schedule.
- [3] The Tribunal ordered, on consent, that a preliminary issue be added to this matter, to be heard concurrently with the IRB claim.

ISSUES

- [4] Is Aviva's s.33 request for KT's bank statements for the period of June 2017 to November 2017 reasonable, and if so, is the applicant in non-compliance with this request and for what period of time?
- [5] The substantive issues in dispute are:
 1. Is KT entitled to an income replacement benefit (IRB) of \$111.06 per week from December 4, 2017 to date and ongoing?
 2. Is Aviva liable to pay an award under *Regulation 664, Automobile Insurance*² ("Regulation 664") because it unreasonably withheld or delayed payments to KT?
 3. Is KT entitled to interest on any overdue payment of benefits?

¹ O.Reg. 34/10

² i.e. s.10, Regulation 664, R.R.O. 1990, *Insurance Act*

RESULT

- [6] Aviva's s.33 request was reasonable. Aviva is not liable to pay IRBs to KT because she has failed to comply with a request for information pursuant to s.33 of the Schedule. Accordingly:
- i. KT's appeal is dismissed.
 - ii. There are no overdue benefits payments and thus no interest owing to her.
 - iii. There is no basis for an award in this matter.

ANALYSIS

Preliminary Issue: Compliance with s.33 Information Request

- [7] Under s. 33(1)1 of the Schedule, an insured person must provide on request any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit. The time period for complying is 10 business days.
- [8] The insurer is not liable to pay a benefit during any period in which the applicant fails to provide the insurer with the requested information: s. 33(6). If the applicant eventually complies with the insurer's request, with a reasonable explanation for the delay, the insurer must pay the withheld benefit: s. 33(8).

Was Aviva's s.33 request reasonably required?

- [9] KT asserts that Aviva's request for her bank records was "invalid" because it already had information sufficient to calculate her IRBs.
- [10] There is no reference to "validity" in the Schedule: s.33 requires requested information to be "reasonably required" to assist the insurer in determining entitlement to a benefit.
- [11] Aviva submits surveillance evidence, uncontested by KT, that she went to her employer's premises on several occasions after the accident and remained there for hours at a time. Surveillance was conducted in November 2017 and October 2018. This happened despite KT's statements to Aviva and IE assessors that she has been off from work ever since the accident. The credibility gap raised by surveillance is widened, in my view, by the fact that KT's employer is a company owned by her husband, making employment records potentially unreliable. In my

view, this raises questions about KT's employment status sufficient to justify seeking further information about post-accident employment income that might reasonably be expected to show up in personal bank records. This is reinforced by KT's failure to address the concerns raised by the surveillance results.

- [12] Aviva's evidence shows that it communicated the reason for its request to KT clearly and succinctly. For example, in a letter dated May 7, 2018, Aviva's adjuster stated that "once we have confirmation that she has not been paid since the accident we will reinstate her benefits."
- [13] I find that Aviva's request for KT's bank records was reasonable based on both the surveillance evidence and the nature of her employment, namely working for her husband. In my view, these raised legitimate questions about KT's post-accident employment status sufficient to justify seeking further information about post-accident employment income that could be reasonably expected to show up in personal bank records. KT chose not to address these concerns in her submissions.
- [14] KT's submissions fail to provide me with any persuasive basis on which to find that Aviva's s.33 request was in any way unreasonable, or in fact in any way unusual.

Did KT comply with Aviva's s.33 request?

- [15] KT's submission is based on her version of the facts:
- i. On November 17, 2017, Aviva requested KT's bank records for the period of June 17, 2017 "to present" – meaning the date of the letter. It also requested her 2016 income tax return.
 - ii. On November 19, 2017, KT says she provided Aviva with the requested bank records and with her 2016 Notice of Assessment (NoA) from the Canada Revenue Agency (CRA). This was done by e-mail, a copy of which was submitted in evidence.
 - iii. In February 2018, insurer examinations (IEs) confirmed KT's medical eligibility for IRBs, meaning that she was found unable to perform the essential tasks of her pre-accident employment.
 - iv. On April 3, 2018 KT's legal representatives wrote to Aviva confirming that the requested financial information had been submitted and urging Aviva to pay KT's IRBs.

- v. On May 9, 2018, Aviva responded with a letter dated May 7, 2018 denying having received all of the requested financial information.
- vi. On May 16, 2018, KT's legal representatives wrote to Aviva, and provided the requested financial information.
- vii. To date, Aviva has not resumed paying IRBs to KT.

[16] To summarize, KT submits that she provided the requested documentation within the prescribed time limit and is entitled to be paid IRBs.

[17] Aviva's version of events is as follows:

- i. Bank statements provided under the December 19, 2017 email were limited to the time period of May 24 to September 22, 2017, as opposed to the period June 17 to November 17, 2017 as Aviva had requested.
- ii. This was confirmed in an email from Aviva's handling adjuster dated December 21, 2017. That email, specified that bank statements from September to November, 2017 were still required.
- iii. In a responding email also dated December 21, 2017, KT's representative confirmed that bank statements had only been provided for the time period of May 24 to September 22, 2017. KT's representative confirmed that bank statements for the time period of September to December of 2017 were being retrieved.
- iv. On February 14, 2018, Aviva's adjuster emailed KT's representative to advise that she had not yet received post-accident bank statements, and that these were required in order for IRBs to be issued.
- v. An April 13, 2018 letter from the KT's Representative confirms that bank statements were only provided for the pre-accident time period.
- vi. A May 7, 2018 letter from Aviva confirms that post-accident bank statements have not been provided.

[18] To summarize, Aviva contradicts KT's submission and asserts that it has not received the complete bank records as requested.

[19] After reviewing all of the correspondence described by the parties and submitted in evidence, I find that KT has not proven that she complied with Aviva's s.33

information request because, despite statements in submissions that she provided the requested records:

- iv. KT's representatives' letter of April 13, 2018 confirms that they had, to that date, sent only pre-accident bank records. The letter reiterates their position that KT was not required to produce post-accident bank records.³
- v. KT's letter to Aviva of May 16, 2018 lists the documentation included on an attached CD. The list includes medical records and KT's 2016 income tax information. It does not include bank records, nor does it indicate that KT believes those records to have been provided to Aviva at that date.
- vi. Aviva repeated its requests on numerous occasions, emphasizing that post-accident bank records remained outstanding and warning of the consequences of non-compliance. This was made crystal clear in the letter of December 2, 2018, suspending KT's IRBs for non-compliance. In the letter dated May 7, 2018, Aviva expressly rejected KT's contention of April 13, 2018, that post-accident bank records could not be required from her.
- vii. My review of the evidence revealed nothing to suggest that KT sent, and that Aviva received, the complete requested bank records. Indeed, the Tribunal's Order of September 25, 2018 indicates that the insurer was still seeking complete bank records at that date.

[20] My decision is that Aviva is not liable to pay KT the disputed IRBs because KT has not complied with Aviva's s.33 request for information, despite repeated requests and notice of the consequences of non-compliance. The evidence suggests to me that KT's non-compliance was not inadvertent.

[21] As a result of my findings, it is unnecessary for me to consider KT's entitlement to IRBs. In any event, without the requested bank records, it is difficult to determine how a fair decision would be made on the amount of her IRB entitlement.

AWARD

[22] Section 10 of Regulation 664 permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. the applicant) was entitled at

³ On the purported basis that KT was "a T4 employee and not self-employed" and that the Schedule did not require such persons to produce post-accident bank records. This theory was not advanced in KT's submissions.

the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. the respondent) has “unreasonably” withheld or delayed payments.

[23] Having found KT’s submissions on the s.33 compliance issue unpersuasive, there is no basis for her claim for an award.

CONCLUSION

[24] KT’s appeal is dismissed and with it her claim to interest and an award.

Released: June 18, 2019



Christopher A. Ferguson
Adjudicator