



Citation: Aviva General Insurance Company v. Ghandahari, 2021 ONLAT 19-009382/AABS

**Released Date: 02/11/2021
File Number: 19-009382/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:

Aviva General Insurance Company

Applicant

and

Sediqa Ghandahari

Respondent

DECISION AND ORDER

ADJUDICATOR: Monica Chakravarti

APPEARANCES:

For the Applicant: Geoffrey Keating, Counsel

For the Respondent: No one appearing

HEARD: Via Written Submissions

OVERVIEW

- [1] The respondent, S.G., was involved in a motor vehicle on November 11, 2016 and sought benefits from the applicant, Aviva pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*¹ (“*Schedule*”)
- [2] Aviva originally paid medical and rehabilitation benefits (the “Benefits”); however, Aviva is now seeking repayment of the Benefits pursuant to s. 52 of the *Schedule* on the basis that S.G. made a willful misrepresentation when she failed to disclose to Aviva that the Accident occurred during the course of her employment and she made a claim for benefits from the Workplace Safety and Insurance Board (WSIB).
- [3] Pursuant to the Tribunal’s Order, Aviva provided their written submissions and evidence for this hearing. S.G. did not provide any evidence or submissions in this hearing.

ISSUES TO BE DECIDED

- [4] The issues to be decided are as follows:
- a. Is the respondent liable to repay the Benefits to the applicant pursuant to section 52 of the *Schedule*, because the respondent made a willful misrepresentation?
 - b. Is the applicant entitled to interest on the amount that the respondent is liable to repay?
 - c. Is the applicant entitled to costs?

RESULT

- [5] The respondent is liable to repay Aviva the Benefits with interest in accordance with Section 52 of the *Schedule* because the applicant made willful misrepresentations. The applicant is not entitled to costs.

ANALYSIS

- [6] Section 52 of the *Schedule* states:

- (1) Subject to subsection (3), a person is liable to repay to the insurer,

¹ O.Reg. 34/10

- (a) any benefit described in this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;

[7] Sections 61(1) and 61(2) of the *Schedule* states:

61. (1) The insurer is not required to pay benefits described in this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997* or any other workers' compensation law or plan. O. Reg. 34/10, s. 61 (1).

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* if the election is not made primarily for the purpose of claiming benefits under this Regulation. O. Reg. 34/10, s. 61 (2).

[8] Section 30 of the *Workplace Safety and Insurance Act, 1997 (WSIA)* states the following:

30. (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease. 1997, c. 16, Sched. A, s. 30 (1).

Election

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected. 1997, c. 16, Sched. A, s. 30 (2).

[9] Aviva submits that S.G. was in the course of her employment when she was involved in the Accident and, therefore, entitled to WSIB benefits. S.G. failed to advise Aviva that she had an application for benefits with the WSIB while she was receiving the Benefits from Aviva. Lastly, Aviva submits that S.G. has not commenced an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* that would exempt her from being entitled to benefits from the WSIB. As a result, Aviva paid the Benefits when they were not required to do so and therefore Aviva is seeking repayment of the Benefits.

[10] S.G. made no submissions.

[11] Based on the evidence, I agree that S.G. made willful misrepresentations when she firstly failed to disclose that her Accident occurred during the course of her

employment and therefore was entitled to WSIB benefits and, secondly, when she failed to advise Aviva that she did not commence an action as referred to in section 30 of the *WSIA*. This led to Aviva paying the Benefits when they were not required to.

- [12] Aviva submits that they were not told at the time of the application for accident benefits and during payment of the Benefits that S.G.'s Accident occurred during the course of her employment. I accept this as it would be unlikely that Aviva would have commenced the payment of the Benefits without requiring anything further from S.G. if they had known that the Accident occurred while S.G. was in the course of her employment.
- [13] On October 23, 2017, Aviva received a letter from the WSIB noting that a claim was registered on behalf of S.G. at the WSIB as a result of the Accident of November 11, 2016. An assignment was also registered.
- [14] Under section 61(1) of the *Schedule*, Aviva is not required to pay certain benefits if S.G. is entitled to benefits from the WSIB. Based on the letter of October 23, 2017, S.G. was entitled to receive benefits from the WSIB. Aviva, however, must pay benefits under the *Schedule* if S.G. elects to bring an action against a person in respect of the injuries she sustained in the Accident as she can elect not to receive her entitled WSIB benefits.
- [15] On July 27, 2018 Aviva sent a letter to S.G. In this letter Aviva noted that S.G. had advised Aviva that she elected to bring an action as contemplated under section 30 of the *WSIA* and Aviva requested proof of the intention to bring the action. Specifically, Aviva requested "proof of filing of Statement of Claim against the third-party insurer" and also requested that S.G. provide at the very least the notice letter to the third party. S.G. was advised that if she failed to provide documentation that she put the third party on notice of her intention to bring an action then Aviva would seek to recoup the monies that it paid in the form of the Benefits. S.G. was also reminded that she had two years from the date of the Accident to file the Statement of Claim against a third party.
- [16] Aviva submits and I accept that S.G. did not put a third party on notice, S.G. did not issue a statement of claim and S.G. did not commence an action as contemplated in section 30 of the *WSIA*. I also find that S.G. told both WSIB and Aviva that she was going to do the above and failed to do so. S.G. never informed Aviva that she failed to do the above and, therefore, on November 12, 2018, Aviva provided a letter to S.G. advising her pursuant to section 61 of the *Schedule* that the Benefits were not payable to her and therefore Aviva sought repayment.

- [17] S.G. made a willful misrepresentation when she purposely failed to advise Aviva that her Accident occurred during the course of her employment. I further find that S.G. made a second willful misrepresentation when she advised Aviva that she was commencing an action against a third party and then failed to tell Aviva that she did not commence an action even when Aviva actively sought this information. Because of these misrepresentations Aviva made payments for medical and rehabilitation benefits in the amount of \$3,408.40² when, pursuant to section 61(1) of the *Schedule*, they were not required to.
- [18] I find that S.G. is liable to repay the amount of \$3,408.40 plus interest in accordance with section 52(5) of the *Schedule*. I also find that the notice of repayment is November 12, 2018 as this is the letter that unequivocally tells S.G. that Aviva is requiring repayment.
- [19] Aviva sought costs under Rule 19 of the Tribunal's *Common Rules of Practice and Procedure*. Other than the fact that S.G. made misrepresentations that were willful in the course of its adjusting of the accident benefits file, Aviva has not presented any submissions or evidence about S.G.'s conduct during the course of the proceedings. I am mindful that S.G. has not participated in this hearing; however, there is no evidence that this has frustrated the Tribunal in its ability to carry out a fair, efficient and effective process or that it has prejudiced Aviva in a way that warrants costs.
- [20] Therefore, there is no award for costs.

CONCLUSION AND ORDER

- [21] The respondent S.G. is liable to repay the applicant Aviva \$3,408.40 plus interest in accordance with section 52(5) of the *Schedule*. The notice of repayment was provided to S.G. on November 12, 2018. I decline to make any order as to costs requested by Aviva.

Released: February 11, 2021

Monica Chakravarti
Adjudicator

² Letter dated November 12, 2018, Respondent's Brief Tab 4.