



Citation: Wilmot v. Aviva Insurance Company of Canada, 2022 ONLAT 21-002048/AABS - PI

Licence Appeal Tribunal File Number: 21-002048/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:

Garth Wilmot

Applicant

and

Aviva Insurance Company of Canada

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Ulana Pahuta

APPEARANCES:

For the Applicant: Frank Comella, Counsel

For the Respondent: Bhavpreet Saini, Counsel

HEARD: Via Written Submissions

OVERVIEW

- [1] The applicant was involved in an automobile accident on July 30, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)*¹ (“Schedule”).
- [2] The parties participated in a case conference on October 18, 2021, where the preliminary issue was raised of whether the applicant was barred from proceeding with his claim for non-earner benefits. A videoconference hearing on the substantive issues was scheduled to commence on December 14, 2022.
- [3] By way of an Adjournment Order dated November 30, 2022, the three-day videoconference hearing on the substantive issues was adjourned, to allow for the preliminary issue decision to be rendered prior to the substantive videoconference hearing.

PRELIMINARY ISSUE IN DISPUTE

- [4] The preliminary issue is:
 - i. Is the applicant barred from proceeding with his claim for non-earner benefits as the issue relates to the insurer’s denial because the applicant failed to complete the election of benefits form to make an election?

RESULT

- [5] The applicant is barred from proceeding with his claim for non-earner benefits as a result of his failure to submit an Election of Income Replacement, Non-Earner Benefit or Caregiver Benefit (OCF-10) form.

BACKGROUND

- [6] The applicant filed an Application for Accident Benefits (OCF-1) on August 21, 2018. The OCF-1 indicated that at the time of the accident, the applicant was employed and working, that his injuries prevented him from working, and that he was unable to return to work after the accident. The OCF-1 also indicated that the applicant was attending school full-time at the time of the accident.
- [7] On August 24, 2018, the applicant filed a Disability Certificate (OCF-3). The OCF-3 indicated that the applicant was working at the time of the accident, that he did not work at least 26 weeks of the previous 52 weeks, and that he was substantially unable to complete the essential tasks of his employment as a

¹ O. Reg. 34/10 as amended.

result of the accident. The OCF-3 further indicated that the applicant suffered a complete inability to carry on a normal life.

- [8] By way of letter dated September 10, 2018, the respondent advised the applicant that upon review of the OCF-1 and OCF-3 the applicant may be eligible for an income replacement benefit. The respondent requested that the applicant provide an Employer's Confirmation of Income (OCF-2) and an Election of Income Replacement, Non-Earner Benefit or Caregiver Benefit (OCF-10), by September 27, 2018.
- [9] The respondent subsequently sent a letter dated November 2, 2018, requesting numerous documents and indicating that it required more information to determine if the applicant was eligible for income replacement benefits (IRBs) or non-earner benefits (NEBs). The respondent again requested that the applicant submit an OCF-10 and OCF-2.
- [10] Approximately a year later, the respondent sent a series of emails, dated November 7, 2019, November 13, 2019, and December 10, 2019 to the applicant's representative indicating that the respondent had not yet received an OCF-10. In its email dated December 10, 2019, the respondent reiterated that the Election of Benefits Form was required, to help the respondent determine which benefit the applicant was pursuing.
- [11] By way of email response dated December 10, 2019, the applicant's representative stated that the applicant was at that time working as a forklift operator, "so no IRB."² The email further stated that given that the OCF-1 indicated that the applicant was in school at the time of the accident, the "benefit of choice would be NEB."³ Two days later the respondent sent a letter to the applicant, again requesting that the applicant complete and submit the OCF-10.
- [12] To date the applicant has not submitted an OCF-10.
- [13] On February 19, 2021, the applicant filed an application with the Tribunal disputing two treatment plans. By way of email to the Tribunal dated February 22, 2021, the applicant sought to add the issue of NEBs.

² Applicant's Submissions, Tab 8 – Email dated December 10, 2019 from Patricia Edwards.

³ *Ibid.*

ANALYSIS

- [14] Upon a review of the submissions and evidence of the parties, I find that the applicant was required to submit an OCF-10. Given that he has failed to do so, he is barred from proceeding with his claim for NEBs.
- [15] Section 35(1) of the *Schedule* states that:
- If an application indicates that the applicant may qualify for two or more of the income replacement benefit, the non-earner benefit and the caregiver benefit under Part II, the insurer shall, within 10 business days after receiving the application, give a notice to the applicant advising the applicant that he or she must elect, 30 days after receiving the notice, the benefit he or she wishes to receive.
- [16] The respondent submits that the applicant's OCF-1 and OCF-3, when read together, indicate that the applicant was potentially entitled to either IRBs or NEBs. As such, the respondent argues that it required additional documentation, namely, the requested OCF-10 and OCF-2 to understand the nature of the applicant's claim and to assess his entitlement to either benefit. The respondent relies on several Tribunal decisions, in support of its position that the applicant's application was incomplete without an OCF-10⁴ and that a request for an OCF-10 is valid when the respondent is provided with conflicting information by the applicant.⁵
- [17] The applicant does not dispute that he has not submitted an OCF-10. However, he submits that an OCF-10 was not required as it was evident from the facts and documents filed, that the only specified benefit he was eligible for, was NEBs. The applicant further submits that his legal representative confirmed to the respondent that he was not eligible for IRBs and that he only qualified for NEBs. Given that there was no ambiguity, the applicant submits that the obligation to provide an election of specified benefit under section 35(1) was never triggered and that he was not required to provide an OCF-10. The applicant further relies on the Tribunal decision *M.K. v. TD General Insurance Company*⁶, to support his position that an OCF-10 is not required to complete an application.

⁴ *17-002496 v Aviva Insurance Company of Canada*, OLATD released December 12, 2017; *17-005302 v. Aviva Insurance Company of Canada*, 2018 CanLII 140996 (ON LAT); *Lefebvre v Aviva Insurance Company of Canada*, 2018 ONSC 5676

⁵ *G.N.K. v Aviva Insurance Canada*, 2020 CanLII 30408 (ON LAT)

⁶ *M.K. v TD General Insurance Company*, 2020 CanLII 34500 (ONLAT)

- [18] I disagree with the applicant's position. I find that in this case, there was sufficient ambiguity as to whether the applicant was potentially entitled to either IRBs or NEBs, such that the respondent's request for an OCF-10 was valid.
- [19] I agree with the respondent's submissions that the applicant provided conflicting information as to his employment status at the time of the accident. The OCF-1 submitted by the applicant indicated that at the time of the accident, the applicant was employed. The applicant's OCF-3 also stated that the applicant was working at the time of the accident, although it indicated that he did not work at least 26 weeks of the previous 52 weeks. The OCF-3 further indicated both that the applicant was substantially unable to complete the tasks of his employment, and that he suffered a complete inability to carry on a normal life. As such, I agree with the respondent that these documents indicated that the applicant could potentially be entitled to either IRBs or NEBs.
- [20] The applicant submits that a subsequently provided statement of priority clarified that he was ineligible for IRBs. The respondent had requested a statement from the applicant on the issue of priority coverage. The applicant submits that in this statement dated September 24, 2018, he clarified that he was not working at the time of the accident and that he was a full-time student.⁷ However, I agree with the respondent that conflicting information was provided in this statement, as the applicant further reported in the document that the source of his income at the time of the accident, was painting "side jobs".⁸ As such, when read together, the OCF-1, OCF-3 and statement of priority are ambiguous as to whether the applicant could potentially be entitled to an IRB or NEB.
- [21] In addition, I do not find that the email sent by the applicant's legal representative definitively settled the issue of the applicant's election of benefits, such that the requested OCF-10 was no longer required. On December 10, 2019, in response to a series of emails from the respondent re-iterating the request for the OCF-10, the applicant's legal representative stated that the "benefit of choice would be NEB."⁹ However, the reasons cited by the applicant's legal representative for the NEB entitlement were that the applicant was presently working as a forklift operator "so no IRB", that he had only worked for 15 weeks out of 52 weeks prior to the accident and that "based on the OCF-1" he was at school at the time of the accident.¹⁰

⁷ Applicant's Submissions, Tab 6 – Statement of the Applicant dated September 24, 2018.

⁸ *Ibid.*

⁹ Applicant's Submissions, Tab 8 – Email dated December 10, 2018 from Patricia Edwards

¹⁰ *Ibid.*

- [22] I agree with the respondent's submissions that this email still left some ambiguity as to the applicant's potential entitlement. I note the respondent's submissions that simply because an insured is working, the applicant is not automatically disentitled to an IRB, depending on the circumstances. In addition, the email indicates that the applicant's representative based her conclusion that the applicant was in school at the time of the accident, on his submitted OCF-1. However, the same OCF-1 also stated that at the time of the accident, the applicant was employed. As such, I find that there was still sufficient ambiguity, even after this email correspondence, as to the applicant's eligibility for either NEBs or IRBs, such that it was reasonable for the respondent to continue to request a formal election. The respondent made such an additional request two days after the December 10, 2019 email exchange. On December 12, 2019, the respondent sent the applicant a letter, again requesting that he complete and submit an OCF-10. From the evidence submitted, it does not appear that the applicant or his representative responded to this request.
- [23] As such, I find that the applicant's application was not complete without the requested OCF-10. In *Gancea v Traveler's Insurance*, cited by the applicant, the Tribunal held that the language of section 35 of the *Schedule* is "clear and mandatory".¹¹ It requires an insurer to notify the insured person of the requirement to elect the benefit the insured wishes to receive, when the information provided indicates entitlement to two or more specified benefits. In other words, where an application indicates possible entitlement to more than one specified benefit, in addition to an OCF-1 and an OCF-3, an OCF-10 is required to "complete" the application for the purposes of triggering the obligations set out in section 36(4) of the *Schedule*.¹² The respondent requested that the applicant complete and submit a formal election by way of an OCF-10, a number of times in the years post-accident.
- [24] The applicant submits that the respondent had never made a request under section 33 of the *Schedule*, for any documentation relating to his entitlement to IRBs or NEBs.¹³ I find that this assertion is not supported by the evidence. In its Explanation of Benefits dated November 2, 2018,¹⁴ the respondent made a section 33 request and specifically noted that it required more information to determine if the applicant was eligible for IRBs or NEBs and requested a number of medical records, and forms such as the OCF-10 and OCF-2.

¹¹ *Gancea v Traveler's Insurance*, 2021 CanLII 108368 at para 15.

¹² *Ibid* at para 16.

¹³ Applicant's Submissions, at para 24.

¹⁴ Respondent's Submissions, Tab 5 – Letter to Applicant dated November 2, 2018.

- [25] The applicant further cites the decision *M.K. v. TD General Insurance Company*¹⁵ in support of his position that an OCF-10 is not required to complete an application. However, I find that *M.K.* can be distinguished from the present case, as in *M.K.* there was no ambiguity as to the applicant's entitlement to a specified benefit.
- [26] I find the caselaw cited by the respondent to be persuasive. In *17-002496 v. Aviva* and *17-0053022 v. Aviva*, the adjudicator held that an application is not complete until the nature of the claim and the benefits being sought are identified. In *17-002496 v Aviva*, the adjudicator further held that, as no OCF-10 was provided, the application was incomplete, and the applicant could not proceed with her claim for NEBs. Further, I agree with the reasoning in *G.N.K. v. Aviva Insurance Canada*¹⁶, cited by the respondent, where the adjudicator held that an insurer's request for an OCF-10 was valid, when conflicting information was provided by the applicant regarding his employment at the time of the accident.
- [27] Upon review of the evidence and submissions of the parties, I find that the information submitted by the applicant, namely, the OCF-1, OCF-3 and statement of priority, indicated that the applicant could potentially be entitled to receive either NEBs or IRBs. To address this ambiguity, the respondent requested a number of times that the applicant submit an OCF-10. Given that the applicant failed to submit the OCF-10 as required by section 35(1) of the *Schedule*, I find that the applicant cannot proceed with the issue of NEBs.

¹⁵ *M.K. v TD General Insurance Company*, 2020 CanLII 34500 (ONLAT)

¹⁶ *G.N.K. v Aviva Insurance Canada*, 2020 CanLII 30408 (ON LAT)

ORDER

- [28] I find that the applicant is barred from proceeding with his claim for NEBs due to his failure to submit an OCF-10.
- [29] Accordingly, a hearing on the remaining issues in dispute may proceed, as per the Case Conference Report and Order dated October 18, 2021 and the Adjournment Order dated November 30, 2022.

Released: December 5, 2022



Ulana Pahuta
Adjudicator