



Citation: Chavez v. Unifund Assurance Company, 2023 ONLAT 20-011594/AABS-PI

Licence Appeal Tribunal File Number: 20-011594/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:

Lenny Katoska Chavez

Applicant

and

Unifund Assurance Company

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Derek Grant

APPEARANCES:

For the Applicant: Sandi Smith, Counsel

**For the Respondent: Gina Nardella, Counsel
Surina Sud, Counsel**

HEARD: By way of written submissions

OVERVIEW

- [1] The applicant, LKC, was involved in an automobile accident on July 11, 2015, and sought benefits from the respondent, Unifund, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”).
- [2] The parties participated in a case conference but were unable to resolve the issues in dispute. Unifund raised a preliminary issue regarding LKC’s claim for non-earner benefits (“NEBs”). It submits that LKC is statute barred from proceeding with her claim for NEBs at the Tribunal because she failed to submit an OCF-3 pursuant to s. 36. It further submits that that pursuant to section 56 of the *Schedule*, LKC is statute barred from proceeding with her claim for NEBs at the Tribunal because she failed to apply within the limitation period of two years after Unifund’s refusal to pay NEBs.

PRELIMINARY ISSUES

- [3] As per the Motion Order dated September 23, 2021, the preliminary issues are as follows:
 - a. Is the application for NEBs statute barred due to LKC’s failure to submit an OCF-3 within 104 weeks of the accident?
 - b. Is the application statute barred pursuant to s. 56 of the *Schedule* because LKC failed to dispute the denial of the benefits within the two-year time limitation?

SUBSTANTIVE ISSUE IN DISPUTE

- [4] The substantive issue in dispute is as follows:
 - a. Is the balance of the cost of examination expense in the amount of \$4,200.00 for an occupational therapy situational assessment and file review, recommended by Omega Medical Assessments, in a treatment plan (OCF-18) submitted September 26, 2018, denied October 1, 2018, reasonable and necessary?

FINDING

- [5] LKC failed to apply for a NEB. While she has submitted an Application for Accident Benefits (“OCF-1”), she failed to submit the required Disability Certificate (“OCF-3”) to Unifund.

- [6] LKC application was filed after the expiry of the prescribed limitation period.
- [7] Section 7 of the *LAT Act* does not give the Tribunal the statutory authority to cure LKC's failure to submit a completed application for a NEB. While it does give the Tribunal discretion to extend the limitation period for the filing of an application to this Tribunal, this is not a case warranting the exercise of that discretion.
- [8] The parties shall contact the Tribunal within 30 days of the release of this preliminary issue decision to schedule a resumption of the case conference to address the substantive issue.

ANALYSIS

NEB – Ss. 32 and 36

- [9] Section 12(1) of the *Schedule* provides that an insurer shall pay for a NEB to an insured who sustains an impairment as a result of an accident and suffers a complete inability to carry on a normal life as a result of that accident *within* 104 weeks. [emphasis added]
- [10] Under the September 1, 2010 *Schedule*, s. 32(5) requires that an applicant shall submit a *completed* and signed application for benefits to the insurer within 30 days after receiving the application forms. [emphasis added]
- [11] Section 36(2) of the *Schedule* sets out that an applicant seeking NEBs *shall submit a completed disability certificate with their application*. [emphasis added]
- [12] For the reasons that follow, I find that LKC did not submit a completed OCF-3 with her application within 104 weeks. Further, I find that LKC did not submit her claim for NEBs within the two-year limitation period after Unifund denied payment of the specified benefit. Accordingly, LKC is statute barred from pursuing her claim for NEBs in accordance with s. 36 and s. 56 of the *Schedule*.
- [13] Unifund submits that LKC failed to establish she was eligible for the NEB as a result of and within 104 weeks after the accident as she failed to complete the mandatory requirement of submitting a completed OCF-3 indicating her eligibility for the NEB within the 104-week period.
- [14] LKC argues that the request for the OCF-3 was made prior to the expiration of the mandatory 26 week waiting period to become entitled to a NEB. As of the December 1, 2015 denial, the 26-week waiting period had not yet expired. Her position is that the denial was pre-emptive and premature. She further submits that the September 11, 2019 denial is also not proper as Unifund did not ask for

an explanation for the delay or refer to any of the medical documentation that had been delivered during the first 104 weeks after the date of loss. LKC takes the position that the December 2015 and September 2019 denials were therefore improper, and she is not statute barred from proceeding with her NEB claim.

- [15] I disagree.
- [16] As it pertains to this matter, the application process is set out under s. 32(1) and (5) wherein a person must notify an insurer of her intention to apply for benefits no later than seven days after the circumstances arose that give rise to the entitlement to the benefit (s. 32(1)). On receipt of notice, Unifund sent an application package containing, *inter alia*, an OCF-1 and an OCF-3.
- [17] Under s. 32(5), LKC was required to submit a completed and signed application for benefits to Unifund within 30 days of receiving the forms. A completed application process includes an OCF-3, as set out under s. 36(2), which references the process set out in s. 32.
- [18] In LKC's case, the accident occurred on July 11, 2015, after which she filed an OCF-1 (September 24, 2015). The OCF-1 indicated she was unemployed at the time of the accident.
- [19] On October 7, 2015, Unifund requested that LKC provide it with a completed OCF-3 in order to determine her entitlement to a NEB.
- [20] On December 2, 2015, Unifund denied LKC's claim for a NEB due to her failure to submit an OCF-3 as initially requested in the October 7, 2015 explanation of benefits letter.
- [21] On March 8, 2019, nearly 4 years after the accident, LKC submitted an OCF-3. I note that the OCF-3 was dated January 2, 2019 and it indicated that she was unable to perform the essential tasks of her employment and that she did not suffer a complete inability to carry on a normal life.
- [22] LKC resubmitted the OCF-3 (the "Amended OCF-3") with amendments made on September 4, 2019. The Amended OCF-3 indicated that LKC was unable to complete the essential tasks of her employment and that she suffered a complete inability to carry on a normal life.
- [23] On September 11, 2019, Unifund informed LKC by way of explanation of benefits that she was required to show that she suffered a complete inability to carry on a normal life within 104 weeks of the accident. Put another way, LKC's September 4, 2019 Amended OCF-3 was provided over four years after the accident, and

almost four years after her September 24, 2015 application. Unifund notified LKC that she had failed to comply with s. 12(1) of the *Schedule* and accordingly, her NEB claim was denied.

- [24] LKC filed her Tribunal application on October 3, 2020. Although the application indicates that the NEB claim was submitted on September 24, 2015, it states that the benefit was denied on September 11, 2019.
- [25] On a plain reading of s. 36(2), “shall submit” is clear, there is no exception to this provision. To successfully apply for a NEB, LKC was required to include an OCF-3 with the September 24, 2015 application in accordance with s. 36(2). She did not. It’s at this point the issue of LKC’s non-compliance with s. 36(2) arises. Contrary to her position that neither s. 32 nor s. 36 create a complete bar to any claim for benefits, failure to comply means she has not applied for the benefit and results in a complete bar to her claim for a NEB.
- [26] I find that the October 7, 2015 explanation of benefits properly requested a completed OCF-3 (I note a blank OCF-3 Form was also included). Further, I find that the December 2, 2015 explanation of benefits formally denying her NEB claim was also proper, including the reference to the October 7, 2017 explanation of benefits.
- [27] LKC has failed to sufficiently address the provisions of the *Schedule* and the timing of her submission of her qualifying OCF-3. Section 12 clearly sets out that an insurer is not required to pay for a NEB for any period more than 104 weeks following an accident. Section 36(3) is also very clear an insured is not entitled to a NEB for any period before an OCF-3 is submitted.
- [28] Since LKC did not submit a qualifying OCF-3 until September 4, 2019, a substantial amount of time after her period of entitlement to a NEB had elapsed, there is no ground on which she can proceed. As LKC did not submit the OCF-3 until over four years after the accident, she is not entitled to the benefit during the entire 104-week period of eligibility pursuant to s. 32 and s. 36.

Section 7 of the LAT Act and s. 56 of the Schedule

- [29] LKC seeks relief from the expiry of the s. 56 limitation provision for her application for dispute resolution over her NEB entitlement under s. 7 of the *Lat Act*, which states:

Extension of time

7 Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

[30] For a late application to Tribunal, I must conduct the *Manual v. Registrar*¹ analysis, that being: 1. Intention to appeal within the appeal period, 2. Length of delay, 3. Prejudice to Unifund, and 4. Merits. I find that all of these factors militate against granting an extension. There is no evidence of LKC's intention to appeal, the extremely length delay, serious prejudice to Unifund because it is now exposed to a liability where it has closed the file, witnesses and documents may be lost, and memories fade. Further, the claim is completely without merit as LKC is not entitled to the benefit until she files an OCF-3 and after 104 weeks. The OCF-3 was filed well after the 104 weeks.

[31] I have found Unifund's October 2015 and December 2015 denials to be proper, therefore, the 5-year delay in submitting an OCF-3 is unreasonable. LKC's application disputing the denial of the benefit almost 5 years later, is unreasonable and well beyond the prescribed two-year limitation period. LKC cannot rely on the s. 7 extension of time provision. Accordingly, LKC is statute barred under s. 56 of the *Schedule* from pursuing her claim for a NEB.

CONCLUSION

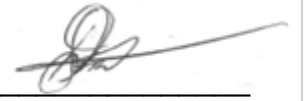
[32] LKC's claim for a NEB is dismissed as it is statute barred due to her non-compliance under s. 36(2) and failure to appeal the denial within two years..

[33] LKC is statute barred from pursuing a claim for a NEB due to her failure to dispute the benefit within the prescribed two-year limitation period, under s. 56.

¹ *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002*, [2012 ONSC 1492 \(CanLII\)](#)

[34] The parties shall contact the Tribunal within 30 days of the release of this preliminary issue decision to schedule a resumption of the case conference in order to address the substantive issues in dispute.

Released: January 17, 2023



**Derek Grant
Adjudicator**