Citation: Nagarajah v. TD Insurance Company, 2022 ONLAT 21-009034/AABS

Licence Appeal Tribunal File Number: 21-009034/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:

Nathaluxmy Nagarajah

Applicant

and

TD Insurance Company

Respondent

DECISION

ADJUDICATOR: **Thérèse Reilly**

APPEARANCES:

For the Applicant: David Wilson, Counsel

For the Respondent: Anne Szydilk, Representative
Derek Greenside, Counsel

Court Reporter: Guido Riccioni

HEARD: by Videoconference: **August 30, 2022**

BACKGROUND

OVERVIEW

[1] The applicant was involved in an automobile accident on April 2, 2007 and sought benefits pursuant to the Statutory Accident Benefits Schedule – *Effective September 1, 2010 (including amendments effective June 1, 2016)*. The applicant signed a settlement disclosure notice (SDN) and partial release (Release) with the respondent on September 6, 2012 which settled a number of medical and other benefits and an income replacement benefit. The applicant brings this application claiming that the settlement is not a full and final settlement and thus not governed by Regulation 664. Alternatively, if governed by Regulation 664, the settlement is not valid due to the non-compliance by the respondent.

[2] The respondent's position is the settlement is governed by Regulation 664 and is valid. The respondent maintains, however, that the applicant failed to comply with section 9.1(7) of Regulation 664 in that he neither provided any written notice to the respondent of his intent to rescind the settlement nor repaid the settlement funds received. This is fatal to the applicant's claim to rescind the settlement. The respondent submits further that the Tribunal lacks equitable jurisdiction to rescind the settlement and even if it does have jurisdiction, the applicant is not in compliance with the requirement of Regulation 664. The applicant disagreed and submitted an application to the Tribunal for resolution of the dispute.

[3] A hearing proceeded by videoconference. No witnesses were called. The parties presented oral submissions.

ISSUES IN DISPUTE

[4] The issues to be decided in the hearing are:

1. Did the applicant enter into a valid settlement when he signed the Settlement Disclosure Notice and Partial Release of Statutory Accident Benefits on September 6, 2012?

2. If the settlement is not valid, what quantum of the settlement funds is the applicant required to pay back to the respondent pursuant to the Settlement Disclosure Notice and Partial Release of Statutory Accident Benefits signed on September 6, 2012?

RESULT

[5] The settlement is governed by Regulation 664 and is valid. The applicant is not entitled to have the settlement rescinded as he has neither provided any written notice to rescind the settlement to the respondent nor repaid any of the settlement funds received as required by section 9.1(7) of Regulation 664. It is not necessary to address the issue of whether the Tribunal has equitable jurisdiction to set aside the settlement or determine the quantum of any repayment of settlement funds.

Preliminary Matter - The Email of June 22, 2022

[6] At the outset of the hearing, the respondent asked that the document found at tab 16 of the applicant's document brief which is an email between counsel dated June 29, 2022 be expunged from the record and not admitted as evidence as the email contains privileged communications. After hearing oral submissions and being satisfied that the email contains privileged communications and that privileged information is presumptively inadmissible under section 15(2)(a) of the *Statutory Powers Procedure Act*, I granted the request and ordered the document expunged from the record.

LAW

Regulation 664

[7] Regulation 664[1] provides a framework for agreements that finally dispose of a claim or dispute in respect of a person's entitlement to statutory accident benefits under the *Schedule*.[2]

[8] Sections 9.1(2) and 9.1(3) require that a settlement notice be in writing, signed by the insurer, and prescribes the following content of a notice:

i. The insurer's offer with respect to settlement;

ii. A description of the benefits that may be available to an insured person under the *Schedule*;

iii. A statement that the insured person may rescind the settlement within two business days of the later of signing the disclosure notice and the release, by delivering a written notice to the insurer and returning any

[1] Regulation 664, RRO 1990.
[2] Ont. Regulation 34/10.

money received by the insured person in the settlement;

iv. A description of the consequences of the settlement of the benefits set out in item (ii), including the restriction on the insured person from applying to the Tribunal or appealing a decision of the Tribunal, a statement advising of possible different tax implications between the benefits and the settlement, and a statement advising that the insured person may not apply to the Tribunal about the settled benefits without having returned the settlement monies;

v. A statement advising the insured person to consider seeking independent legal, financial and legal advice before entering into the settlement; and

vi. A place for the insured person to sign indicating that they have read the settlement disclosure notice and considered seeking the professional advice set out in item (v).

[9] Section 9.1(4) states that an insured person is permitted to rescind a settlement within two business days after the insured person signs the disclosure notice and the release, whichever is later; however, section 9.1(5) states that this two-business-day period does not apply if the insurer failed to comply with the prescribed requirements of a settlement.

[10] Section 9.1 (7) states that the insured person can rescind a settlement by delivering a written notice to the office of the insurer or its representative and by returning any money received by the insured as consideration of the settlement.

[11] Section 9.1(8) states that no person can apply to the Tribunal under section 280(2) of the *Insurance Act* for any benefits that are subject of a settlement unless the person has returned the money received as consideration for the settlement.

FACTS

Minutes of Settlement

[12] The applicant entered into evidence the minutes of settlement[3] entered into with the respondent dated August 3, 2012 in relation to the accident of April 2, 2007, which included the following terms:

[3] Exhibit 1, Minutes of Settlement, dated August 3, 2012, tab 1, document brief of the applicant.

a. The respondent would pay to the insured the sum of $125,000 for all benefits including interest owing to the date hereof, it being understood that “TD shall be permitted to allocate the aforementioned amount as they see fit in the Settlement Disclosure Notice” (the SDN).

b. The settlement includes $12,500 for costs.

c. TD agreed to reinstate the income replacement benefit (IRB) effective August 4, 2012 but payment of the benefits will be withheld and not paid until the applicant has executed a Release and SDN to be prepared by TD.

[13] The SDN and Release[4] were signed by the applicant on September 6, 2012.

[14] The first page of the SDN is labelled “Final Settlement of a Statutory Accident Benefits Claim” and states the following:

a. Before signing, the insured should consider legal, financial and medical advice,

b. If the insured signs the SDN and Release, the insured may be giving up rights they have now or in the future even if their condition changes; and,

c. If the insured does sign the SDN and Release the insured has 2 business days to change his or her mind.

These conditions are repeated again in the page called “What Does it Mean if You Settle Your Claim?”.

[15] The SDN also attached a document called Insurer’s Offer to Settle Benefits (the Offer) that stated the following are included in the Offer: (The total is stated as $142,749.12):

a. You have been offered $64,850.88 for all past IRBs up to August 3, 2012.

b. You have been offered $6,000 for all past and future medical benefits.

c. You have been offered $11,250 for all past and future attendant care benefits.

[4] Exhibit 1, SDN and Partial Release dated September 6, 2021, Tab 2 and Applicant Document Brief and pages 5 of 6 and 6 of 6 can be found at Exhibit 2, Tab 2B of the Respondent’s Document Brief.

d. You have been offered benefits for payments of other expenses specified as housekeeping.

e. You have been offered $4,400 for all past and future benefits for other expenses.

f. You have been offered $3,700 for the cost of examinations.

g. You have been offered $56,248.24 for other items.

[16] The Offer also states that by signing and initialing each page of the SDN, the applicant is accepting this Offer as a final settlement as outlined in the attached Release associated with the accident on April 2, 2007. The Offer states the insured may within two business days after the later of the day he signs the SDN and the day he signs the Release, rescind the settlement by delivering a written notice to the office of the insurer and returning any monies received in consideration of the settlement.

[17] The Release signed by the applicant sets out a breakdown of the lump sum settlement payment and releases the insurer from all claims and demands arising from the accident including all claims, interest, legal expenses, disbursements and costs which may have been incurred by the insured for:

a. Past IRBs up to August 3, 2012,

b. All Attendant Care Benefits,

c. All Housekeeping Benefits,

d. All past cost of examinations to August 3, 2012, and,

e. All past medical benefits claims up to August 3, 2012.

[18] The parties signed another SDN and Release dated November 10, 2016[5] which settled on a full and final basis the IRB claim. The parties agree this second SDN and Release are not in dispute and its validity is not being questioned. The focus here is on the settlement of August 3, 2012.

THE POSITIONS OF THE PARTIES

The Applicant's Position

[5] Exhibit 1, tab 18, SDN and Partial Release, dated November 10, 2012, Applicant Document Brief.

[19] The applicant claims the SDN and Release is not a full and final settlement and thus Regulation 664 does not apply. If Regulation 664 is not applicable there is no obligation to give notice to rescind or repay the settlement funds received. Alternatively, the settlement is not valid due to the noncompliance by the insurer. He relies on the *Parveen* decision and maintains the insurer must establish the settlement document contains the proper, required wording that outlines to an insured when the 2 business day period to rescind begins. He claims the form in this appeal is the same form as in *Parveen* and it does not contain the required wording. As such, the settlement is not valid. He claims he is not precluded from proceeding with a claim for benefits arising from this accident specified in a related Tribunal file, 21-004144/AABS.[6] The appeal in file 21-004144/AABS is scheduled to proceed to a hearing with the Tribunal to address substantive issues which include attendant care and housekeeping benefits.

The Respondent's Position

[20] The respondent's position is that the settlement is valid and is governed by Regulation 664. The applicant has failed to comply with the procedure in section 9.1(7) of Regulation 664 for setting aside the settlement in that he failed to give the required written notice to rescind the settlement and failed to repay any of the settlement funds received. Both are required before the settlement can be rescinded. The respondent requests this appeal and the related appeal, 21-004144/AABS, be dismissed. The respondent also argues that the Tribunal has no equitable jurisdiction to set aside the settlement and even if it does, the applicant is in noncompliance with the mandatory provisions of section 9.1(7).

ANALYSIS AND DECISION

[21] Before addressing the substantive arguments raised in this appeal, I make the following orders respecting who bears the onus to establish the settlement is not valid and the request to order a dismissal of a related file.

No Order to Dismiss the Appeal in Related File 21-004144/AABS

[22] The respondent asks for an Order dismissing the appeal in related file 21-004144/AABS which involves the same accident and parties. The hearing in file

[6] File 21-004144/AABS involves the same accident and parties and is scheduled to proceed to a hearing in December 2022. The issues in dispute are claims for attendant care benefits, housekeeping and home maintenance, the cost of an examination and an award. No order exists combining this file with 21-004144/AABS and ordering they be heard together.

21-004144/AABS is set to proceed in December 2022. There is no order combining this appeal with file 21-004144/AABS and ordering they be heard together. File 21-004144/AABS is not before me. The respondent's request for the Tribunal to dismiss the appeal in file 21-004144/AABS can be addressed by motion to the Tribunal.

The Applicant bears the Onus of Proof

[23] The applicant relies on the *Parveen*[7] decision for the proposition that the respondent bears the onus to establish the form of settlement in issue is valid. The respondent maintains the opposite and argues the applicant bears the burden of proving that the settlement is invalid. In my view, the respondent is correct. The applicant seeks the relief of being excused, relieved, etc. from the settlement in question because he asserts the settlement is invalid, accordingly the applicant bears the onus of proving the settlement is invalid.

The Settlement is Governed by Regulation 664

[24] The applicant contends that the SDN is not full and final, and therefore is not governed by Regulation 664. He refers to the wording in the SDN and maintains some of the benefits like the IRB are partially settled and not settled on a full and final basis. He further relies on the definition of "settlement" set out in section 9.1(1), which is "an agreement between an insurer and insured that finally disposes of a claim or dispute in respect of an insured person's entitlement to one or more benefits under the *Statutory Accident Benefits Schedule*." The applicant argues that the settlement did not finally dispose of the IRB since it is time limited, i.e. up to August 3, 2012. He also argues the medical benefits and cost of examinations were also time limited. Accordingly, the applicant submits that the presence of an ongoing dispute regarding the benefits means that the settlement is not full and final.

[25] I do not accept this argument. The definition of a "settlement" expressly refers to a final disposition of a claim to *one or more benefits* under the *Schedule*. It does not state *all benefits* must be settled on a full and final basis. While the Release and SDN refer to a *partial settlement* of the IRB and medical benefits and cost of examinations, it also refers to a settlement *in full* of all attendant care benefits and housekeeping benefits. I do not agree that the wording that the IRB is settled to August 3, 2012 creates an ambiguity on whether the attendant care and housekeeping and home maintenance claims were settled on a full and final basis. The language in section 9.1(1) indicates the legislature did not intend to

[7] *Parveen v Aviva Canada Inc,* [2012] OFSCD No. 63, Tab 1 of the applicant's brief of authorities.

apply to settlements that dispose of *all benefits* claimed on a full and final basis; rather, section 9.1(1) expressly refers to a final disposition of an insured person's entitlement to *one or more benefits*. Had the legislature intended section 9.1(1) to be as the applicant asserts, it would have used other language such as "finally disposes of all claims under the *Statutory Accident Benefits Schedule*," but did not.

[26] Moreover, the language of the SDN which the applicant signed states specifically that, by signing the SDN and Release, the insured is agreeing the offer is a final settlement.

[27] Furthermore, the applicant offered no case law to support the position that the settlement in question is not governed by Regulation 664. I am not persuaded by the applicant that the settlement is not full and final, and thus Regulation 664 does not apply. I find the SDN and Release clearly stated they were for the final settlement of all past and future attendant care benefits and benefits for other expenses including housekeeping.

Insurer is in Compliance with Regulation 664

[28] The second argument advanced by the applicant is that the settlement is not valid on the basis that the insurer is not in compliance with Regulation 664. I start by considering the requirement for the SDN to comply with the informational content required by section 9.1(3) of the Regulation, then consider the rest of the applicant's argument.

[29] I am satisfied that the SDN in this appeal complies with all of the content required by Section 9.1(3) of the Regulation. Of relevance to this dispute, I note that the SDN contains:

i. The insurer's offer with respect to settlement (as it was attached to the SDN);

ii. A statement that the insured may, within two business days after the later of the day he signs the SDN and the day he signs the release, rescind the settlement by delivering a written notice to the office of the insurer and returning any monies received as consideration for the settlement,

iii. A statement advising the insured person to consider seeking independent legal, medical and financial advice before entering into the agreement, and

iv. A place for the insured to sign, which he did, indicating that by signing the release and initialling each page of the SDN, the insured is accepting this

offer as a final settlement as outlined in the attached Release associated with the accident on April 2, 2007.

[30] The applicant relies on the Financial Services Commission (FSCO) arbitration decision in *Parveen v Aviva Canada Inc.*,[8] in which Arbitrator Alves examined a similarly worded SDN and found in that decision that the SDN provided by the insurer to the insured was not valid because it did not include important information required by Regulation 664. In *Parveen*, the applicant had signed the SDN and several weeks later had signed the release. While the SDN had a statement that told the insured what to do if she signed the release first and a SDN second, it did not contain a similar statement what to do if she signed the SDN first and then the release. The arbitrator found that the insured was not provided with all the required information that the two business days were to be counted after an insured signed the SDN or after she signed the release, or when the two business day period started to know if she could rescind the agreement.[9] The arbitrator found that the insured could rescind the settlement even beyond the two day period as provided in section 9.1(5) of Regulation 664.

[31] In this appeal, the SDN stated an insured may, within two business days after the later of the day he signs the SDN and the day he signs the release, rescind the settlement. The SDN makes it clear to an insured that the two business day notice period starts on either the signing of the SDN or the signing of the Release. It is clear when the two business day notice period begins. Unlike the SDN in *Parveen*, the SDN in this appeal meets the requirements of section 9.1.

[32] I agree with the respondent that the *Parveen* decision is distinguishable for several reasons. In *Parveen,* although the SDN contains similar language as the SDN in this appeal, the SDN and Release were signed on different days. In this matter, the applicant signed the SDN and the Release on the same day, therefore there cannot be any confusion or inability to know when the two business day period to rescind would start.

[33] Moreover and more importantly, in *Parveen*, the applicant had provided written notice to rescind the settlement and had returned the settlement monies received as consideration for the settlement. That is not the case here. The applicant has not provided written notice to rescind the settlement and has not returned the settlement monies received.

[8] *Parveen v Aviva Canada Inc,* [2012] OFSCD No. 63, Tab 1 of the applicant's brief of authorities.
[9] *Aviva Canada Inc. v. Parveen*, FSCO P-12-00023 and P12-00024, Tab 2, Applicant Brief of Authorities.

No Notice To Rescind Provided and Settlement Funds Not Repaid

[34] The applicant submits that the communication dated March 26, 2019 [10] from the applicant's counsel to the claims specialist of the respondent acknowledging the settlement form is insufficient and as such the applicant is at liberty to rescind is notice as required by section 9.1. I disagree. The communication is not notice. It is not signed by the applicant and, more importantly, does not state the applicant is giving notice to rescind the settlement. It merely states he is at liberty to rescind.

[35] The respondent relies on the Tribunal decision of *WM v. Economical Mutual Insurance Company*[11] which found the SDN was valid and the applicant had failed to follow section 9.1 (7) for rescinding the settlement and therefore cannot proceed further. I agree with the respondent. No notice to rescind has been provided by the applicant as required. Further, the applicant has not repaid the settlement funds.

[36] The applicant argues the requirement of the applicant to repay the settlement funds is absurd. He argues that $65,000 of settlement funds were received in respect of the IRB claim that was settled on a full and final basis. The applicant could therefore never recover those funds in an arbitration. Regulation 664 is consumer protection legislation and consistent with that legislation, the applicant should not be required to make a repayment. If the Tribunal determines Regulation 664 is not applicable, then the applicant would not have to repay any funds.

[37] Regulation 664 is applicable and section 9.1(7) requires a repayment as part of rescission. Section 9.1 (8) applies and the applicant cannot apply to the Tribunal with respect to benefits that are the subject of a settlement. The applicant has not repaid the settlement funds.

[38] I note the applicant did not raise any arguments claiming the settlement is not valid due to lack of capacity on the part of the insured or the presence of duress when signing the settlement agreement.

Equitable Jurisdiction of the Tribunal

[39] The respondent argues that the Tribunal has no equitable jurisdiction to set aside the settlement. Further, if the Tribunal has equitable jurisdiction, which is not

[10] Communication dated March 26, 2019 from the applicant's counsel, tab 5, applicant document brief.
[11] *WM v. Economical Mutual Insurance Company,* 2019 CanLII 126102 (ON LAT*),* Respondent Brief of Authorities.

admitted by the respondent, then I must follow the requirements of Regulation 664 which requires the insured to follow its requirements and provide notice and a return of the settlement funds. I concur.

[40] The applicant does not argue equitable relief excuses the applicant from the statutory requirements for notice and repayment. As mentioned he argued the repayment requirement is absurd because the applicant could not reclaim the funds repaid and the repayment requirement is contrary to consumer protection legislation. I was not presented with any case law or Tribunal decision to support the position that an inability to reclaim settlement funds that have been repaid is a grounds to excuse an insured from compliance with sections 9.1(7) and (8) of Regulation 664.

[41] I find, in light of my decision that the settlement is valid, and in the absence of arguments that the applicant is excused from compliance on the basis of equitable jurisdiction it is not necessary to address the issue of whether the Tribunal has equitable jurisdiction to set aside the settlement.

[42] Lastly, the settlement which is governed by Regulation 664 is valid. As such, it is not necessary to address the question of quantum with respect to a return of the monies for any repayment.

CONCLUSION

[43] The settlement is valid. The applicant is not entitled to rescind the settlement as he has failed to provide notice and has not repaid the settlement monies. The application is dismissed. I decline to order the dismissal of the appeal in file 21-004144/AABS as the matter is not before me. The issue may be addressed via a motion to the Tribunal. It is not necessary to address the issue of the quantum of any repayment.

Released: October 26, 2022

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Thérèse Reilly, Adjudicator