



Citation: Adams v. Aviva Insurance Company, 2023 ONLAT 22-002323/AABS

Licence Appeal Tribunal File Number: 22-002323/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:

Tracy Adams

Applicant

and

Aviva Insurance Company of Canada

Respondent

PRELIMINARY ISSUE DECISION [AND ORDER]

ADJUDICATOR:

Tavlin Kaur

APPEARANCES:

For the Applicant:

Tracy Adams, Applicant
Ken Ciupka, Counsel

For the Respondent:

Tiffany McCelland, Representative
Nicholas Maida, Counsel

**Heard by way of written
submissions**

OVERVIEW

- [1] This proceeding concerns a dispute between an insured person (the applicant) and an insurer (the respondent) about automobile insurance benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”) arising out of a motor vehicle accident on **August 28, 2018**. The respondent raised a preliminary issue, which is what this hearing will consider.

ISSUES IN DISPUTE

- [2] The preliminary issue to be decided is:
1. Is the applicant barred from proceeding with her claim for medical and rehabilitation benefits, pursuant to section 55(1)1 of the *Schedule*?

BACKGROUND

- [3] On August 28, 2018, the applicant was involved in an automobile accident. She retained legal representation a week after the accident. However, she reported the accident to the respondent on June 13, 2019. On June 13, 2019, the respondent provided the applicant with the accident benefits package. The completed Application for Accident Benefits (‘OCF-1’) was returned to the respondent on October 20, 2021. The applicant attended an Examination Under Oath (‘EUO’) on December 21, 2021. On February 1, 2022, the applicant was informed that the respondent was denying her claim due to non-compliance with sections 32(1) and 32(5) of the *Schedule*.

Parties’ positions

- [4] It is the respondent’s position that the applicant has not provided a reasonable explanation for failing to comply with sections 32(1) and 32(5) of the *Schedule*. The respondent submits that neither of the applicant’s explanations for the delay in reporting the accident to the respondent or in completing and submitting the application for benefits are credible.
- [5] The applicant submits that the respondent failed to comply with section 32(2) of the *Schedule* and thus it cannot rely upon the time limit prescribed by s. 32(5). According to the applicant, the respondent has not adduced any evidence to suggest that it discharged its obligation under section 32(2)(c) to provide information to assist the person in applying for benefits and more specifically, to provide the applicant with information pertaining to the consequences of failing to comply with section 32(5) and the ability to provide a reasonable explanation for

non-compliance. The respondent did not provide a written explanation of benefits available to the applicant in accordance with s. 32(2)(b) and information on the election relating to income replacement, non-earner and caregiver benefits in accordance with s. 32(2)(d).

- [6] Moreover, if it is found that the applicant is disentitled to accident benefits, the applicant submits that she has provided a reasonable explanation for her failure to comply with the time periods prescribed by the *Schedule*. She submits that she did not understand what “accident benefits” were, how they were claimed and from whom they may be claimed. She did not understand or realize that she had the opportunity to make a claim for treatment, or any other benefit for that matter, from the insurer of her workplace’s vehicle. She apprised the respondent of the subject accident as soon as was reasonably practical.

LAW

- [7] Pursuant to s. 32(1) of the *Schedule*, a person who intends to apply for statutory accident benefits shall notify the insurer of their intention no later than the seventh day after the circumstances that give rise to the entitlement to the benefit, or as soon as practicable after.
- [8] Once an insurer receives notice of an applicant’s intention to apply for statutory accident benefits, the insurer must provide the applicant with the appropriate OCF-1 forms, a written explanation of the benefits available, information to assist the person in applying for benefits and information on the election relating to the specified benefits (s. 32(2)). Pursuant to s. 32(5) of the *Schedule*, the applicant must then submit a completed and signed application for benefits to the respondent within 30 days after receiving the forms.
- [9] It should be noted that s. 34 of the *Schedule* states that “a person’s failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation.” The interpretation of “reasonable explanation” is guided by *Horvath and Allstate Insurance Company of Canada*¹, and was more recently reiterated in *K.H. vs Northbridge*.² The guiding principles are summarized as follows:

1. An explanation must be determined to be credible or worthy of belief before its reasonableness can be assessed.

¹ FSCO A02-000482, June 9, 2003

² 2019 CanLII 101613 (ON LAT)

2. The onus is on the insured person to establish a “reasonable explanation.”
3. Ignorance of the law alone is not a “reasonable explanation.”
4. The test for “reasonable explanation” is both a subjective and objective test that should take account of both personal characteristics and a “reasonable person” standard.
5. The lack of prejudice to the insurer does not make an explanation automatically reasonable.
6. An assessment of reasonableness includes a balancing of prejudice to the insurer, hardship to the claimant and whether it is equitable to relieve against the consequences of the failure to comply with the time limit.

Did the applicant fail to notify the insurer of his intention no later than the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable?

- [10] It is not disputed that the applicant did not notify the respondent within the timeframe set out in section 32(1) of the *Schedule*. The accident occurred on August 28, 2018 and she notified the respondent on June 13, 2019. There is a significant delay of almost a year. I must determine whether the applicant had a reasonable explanation for the delay.
- [11] The applicant retained counsel approximately a week after the accident. The explanation proffered by the applicant is that she did not know how the process works and that she left the matter in the hands of her previous lawyer. Once she found out that she could obtain treatment, she notified the respondent.
- [12] I am bound by *Cervo v. Raimondo* (‘*Cervo*’), 2006 CanLII 37119 (ONCA). The Court citing *Scherer v Palletta* held at paragraph 46 that:

In general, the solicitor is the client’s authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls under the apparent scope of the agent’s authority.

- [13] On the facts before me, the applicant gave her lawyer the authority to act on her behalf in relation to the accident. It is assumed he would know about the processes set out in the *Schedule*. That is what he was hired to assist the applicant with.
- [14] I find the explanation for the delay is not reasonable. In *Cervo*, the Court of Appeal agreed with the motion judge and found that mere reliance on the solicitor was not a reasonable explanation.
- [15] Any lack of knowledge or confusion that the applicant had is not relevant as counsel is expected to assist and be knowledgeable on the subject. It was not expected for the applicant to know the law and act on her case if he was entrusted to do so.
- [16] I find that there is no reasonable explanation for the delay from the time that the applicant retained her former lawyer to when she notified the respondent regarding the circumstances giving rise to the claim on June 13, 2019. Nor has she provided any evidence of any limitation between her and her former lawyer or his authority to act for her. Moreover, ignorance of the law is not an excuse. I am not persuaded by the applicant's explanation.
- [17] As I have determined that the applicant failed to provide a reasonable explanation for the delay in notifying the respondent regarding the circumstances that gave rise to the entitlement to the benefit, I find that it is unnecessary to consider whether she failed to submit an OCF-1 to the insurer within 30 days after receiving the application forms.
- [18] Pursuant to section 55(1)1 of the *Schedule*, the applicant shall not apply to the Tribunal as a result of her failure to adhere to the timelines provided by the *Schedule*. Considering my analysis above, I find no compelling reason to invoke section 55(2) of the *Schedule* and use my discretion and permit the applicant to continue her application to this Tribunal. I am fully cognizant of the ramifications to the applicant's claims for accident benefits and do not make this decision lightly.

CONCLUSION AND ORDER

- [19] The applicant has not provided a reasonable excuse for the delay in reporting her intent to seek accident benefits.

- [20] Pursuant to section 55(1)1 of the *Schedule*, the applicant shall not apply to the Tribunal because she failed to comply with time limits prescribed by section 32(1) of the *Schedule*.
- [21] The application is dismissed.
- [22] The written hearing scheduled for August 4, 2023 will be vacated.

Released: January 27, 2023

Tavlin Kaur
Adjudicator