



Citation: Barnes v. Allstate Insurance Company of Canada, 2024 ON LAT 22-009748/AABS-PI

Licence Appeal Tribunal File Number: 22-009748/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:

Stuart Barnes

Applicant

and

Allstate Insurance Company of Canada

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: Tanjoyt Deol

APPEARANCES:

For the Applicant: Elvis Viskovic, Paralegal

For the Respondent: Greg Specht, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Stuart Barnes, the applicant, was involved in an automobile accident on January 29, 2020, and sought benefits pursuant to the Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016) (the “*Schedule*”). The applicant was denied benefits by the respondent, Allstate Insurance Company of Canada (“Allstate”) and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

- [2] The preliminary issue to be decided as per the Adjournment Order from this Tribunal, released on February 5, 2024, is as follows:
- a. Is the applicant barred from proceeding with this application pursuant to s. 55(1)1 of the *Schedule* as the applicant did not provide an Application for Accident Benefits (“OCF-1”) until February 24, 2022¹, and, therefore, failed to submit an application for benefits within the deadlines provided for in the *Schedule*?

RESULT

- [3] I find that the applicant is statute-barred from proceeding with his application.

ANALYSIS

Background and parties’ positions

- [4] The applicant was involved in an accident on January 29, 2020.
- [5] According to the property damage log notes, the applicant contacted Allstate on January 30, 2020, to report the accident. On the same day, Allstate mailed out the OCF-1 package to the applicant.
- [6] On February 24, 2022 (two years after the OCF-1 being mailed out), the applicant submitted the OCF-1 to Allstate.
- [7] On March 7, 2022, Allstate responded to the late OCF-1 and advised the applicant that pursuant to ss. 32(1), 32(5) and s. 33, it was requesting a

¹ The Adjournment Order, released on February 5, 2024, noted that the OCF-1 was provided on February 26, 2022. However, upon review of the respondent’s submissions and evidence, I note that the OCF-1 was provided on February 24, 2022.

reasonable explanation as to why the OCF-1 was not submitted within 30 days as required pursuant to s. 32.

- [8] On April 21, 2022, the applicant's legal representative's office sent an email to Allstate which appears to suggest that the delay in submitting the OCF-1 was due to the applicant not being aware of his rights and entitlement to benefits until he consulted with a lawyer.
- [9] On May 19, 2022, Allstate sent an explanation of benefits to the applicant and advised that its position was that the explanation provided on April 21, 2022, was not reasonable. As such, Allstate advised that it was unable to consider the applicant's OCF-1 in accordance with s. 32 of the *Schedule*.
- [10] Subsequently, the applicant filed an application with the Tribunal.
- [11] A case conference was held in this matter on May 1, 2023, and unfortunately, there was some confusion created by the Case Conference Report and Order. As such, the Tribunal granted Allstate's adjournment request and adjourned the substantive hearing to May 3, 2024, to allow this preliminary issue to be addressed first.
- [12] I now turn to the parties' respective positions with respect to the preliminary issue in dispute.
- [13] Starting with Allstate, it argues that the applicant did not submit an OCF-1 until February 24, 2022, which is beyond the 30-day deadline as mandated by s. 32(5). Allstate takes the position that a reasonable explanation for the two-year delay in submitting the application has not been provided by the applicant. Thus, it argues that the applicant should be barred from proceeding with this application pursuant to s.55(1)(1).
- [14] In my view, the applicant's submissions are somewhat unclear and confusing. However, he appears to be arguing that his injuries from this accident, and their discoverability, led to him seeking out legal representation, and as a result, a Statement of Claim was issued on January 17, 2022. Moreover, the applicant relies on s. 258.3(a) of the *Insurance Act*, R.S.O., 1990, c. I.8, that an OCF-1 is required to be filed as per that section. As such, he submits that an OCF-1 was filed with "the accident benefits insurer" on February 15, 2022. Finally, the applicant's position is that he provided further explanations for the delay, on February 16, 2023, which was not considered by the respondent.

The Law

- [15] Pursuant to section 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.
- [16] 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, as required by section 32(2). Pursuant to section 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.
- [17] I note that section 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 onus is on the applicant to establish a reasonable explanation for the delay. The interpretation of "reasonable explanation" is guided by *Horvath and Allstate Insurance Company of Canada*, FSCO A02-000482, June 9, 2003, and was more recently reiterated in *K.H. v. Northbridge*, 2019 CanLII 101613 (ON LAT). 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.
 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.

The applicant did not submit the OCF-1 in accordance with s. 32(5)

- [18] The applicant does not appear to be disputing that he did not submit the OCF-1 within 30 days. Instead, there appears to be uncertainty between the parties of when the OCF-1 was submitted.
- [19] The applicant argues in his submissions, that an OCF-1 was filed with “the accident benefits insurer” on February 15, 2022, however, he did not tender evidence to support this. Also, upon review of an email from the applicant’s legal representative, dated February 15, 2023, I note that it states that an initial OCF-1 was submitted to Aviva. However, once again, the applicant did not tender evidence to support this, like a copy of the correspondence that was sent and how. It is well-settled that submissions are not evidence.
- [20] As such, I have no reason to interfere with Allstate’s position that the OCF-1 was submitted on February 24, 2022, as it has produced the correspondence as evidence to support this position.
- [21] Regardless, whether the OCF-1 was submitted on February 15, 2022, or February 24, 2022, this is still beyond the 30-day deadline as mandated by s. 32(5). Thus, the applicant did not comply with s. 32(5), and I must now determine whether the applicant has a reasonable explanation for the delay.

The applicant has not established a reasonable explanation for the delay

- [22] I find that the applicant has not provided a credible explanation for his delay in submitting an OCF-1.
- [23] The applicant submits that the initial explanation provided by his “counsel”, on April 21, 2022, was done prior to receiving medical records. The applicant further argues that his legal representative provided further explanations on February 16, 2023, and that there is nothing in the *Schedule* that prevents him from providing further explanations to explain or clarify. Finally, the applicant argues that since the respondent did not acknowledge the further explanation, he takes the position that the Tribunal and himself have the “last word” to decide whether the explanation is reasonable.
- [24] The respondent’s submissions did not address the further explanations provided by email on February 16, 2023, and instead focused on the explanation provided on April 21, 2022. The respondent had a further opportunity to provide reply submissions in accordance with the Adjournment Order but chose not to do so.

- [25] The onus is on the applicant to establish a reasonable explanation for the delay, not on the respondent to disprove, which also includes an onus to establish that the explanations are credible or worthy of belief before reasonableness can be assessed.
- [26] The applicant's representative provided a variety of explanations in an email, dated February 16, 2023. First, the applicant did not think he needed chiropractic treatment and since he assumed that this is what this claim is for, he did not give it another thought. Second, due to the COVID-19 pandemic, even if he wanted treatment, nothing was available, and he did not seek frequent medical attention either as a result of the pandemic. Third, the applicant was diagnosed with fibromyalgia, and was advised by his family physician, Dr. Linda Ingber in the end of 2021, that the accident may have caused this. As such, he started looking for legal representation.
- [27] I do not find any of these explanations provided by the applicant to be a credible explanation for the delay.
- [28] First, in my view, the applicant's explanation that he thought AB claims are only for chiropractic treatment, is not credible or worthy of belief, as the respondent sent a detailed package for accident benefits on January 30, 2020. Indeed, this correspondence provided a description of all the available benefits pursuant to the *Schedule*, and in particular a detailed description was provided with respect to available medical and rehabilitation benefits. Nowhere in this correspondence, was there a reference to only chiropractic benefits being available.
- [29] My finding is also supported by both the accident benefits and property damage adjuster log notes, where there is no reference to the applicant being advised that only chiropractic treatment was available, or that he believed this. In particular, in a log note, dated February 4, 2020, it was noted that the applicant advised that he was not proceeding with the AB claim. However, once again, there is no reference to the applicant choosing not to proceed with his AB claim because he thought it was only for chiropractic benefits. As such, I am not persuaded by the applicant's position that he was unaware that he could apply for other benefits, aside from chiropractic treatment.
- [30] Second, the applicant's explanation that the COVID-19 pandemic had a part in delaying the application is also not credible or worthy of belief. The OCF-1 was sent and due before the COVID-19's related lockdowns began.
- [31] Moreover, the records of Dr. Ingber also do not support the applicant's position. For example, the applicant spoke to Dr. Ingber over the phone on August 5,

2020, September 29, 2020, October 8, 2020, November 6, 2020, November 25, 2020, August 4, 2021, November 3, 2021, November 27, 2021, and December 31, 2021. In my opinion, these entries weaken the applicant's position, as these records show that the applicant was able to seek medical attention over the phone, therefore I am not persuaded that the pandemic restricted his ability to do so. As such, I am not persuaded that the pandemic was the reason for the delay in submitting the application.

- [32] I now turn to the applicant's last explanation, that once he was told by Dr. Ingber that his fibromyalgia may have been caused by this accident, he sought out legal representation. I do not find this explanation credible either, based upon the evidence proffered by the parties.
- [33] First, in my opinion, the applicant was not diagnosed with fibromyalgia. I acknowledge the applicant's position that he believes he was, however, upon review of the record, dated January 4, 2021, I note that Dr. Ingber did not diagnose the applicant with fibromyalgia. Instead, she noted "will refer to rheumatology? Fibromyalgia." In my interpretation, Dr. Ingber was noting the possibility of fibromyalgia and as a result, referred him to a rheumatologist to determine same.
- [34] The records from the rheumatologist, Dr. Nooshin Samadi, do not support the applicant's position that he was diagnosed with fibromyalgia. For example, on March 31, 2021 (over a year following this accident), the applicant for the first time advised a medical doctor of his involvement in this accident. Dr. Samadi did not diagnose the applicant with fibromyalgia, rather he was diagnosed with degenerative changes in the spine and hip osteoarthritis, and there is no reference to whether this is from the accident. On June 10, 2021, the applicant met with Dr. Samadi once again, and there was no diagnosis of fibromyalgia.
- [35] Subsequently, on March 1, 2022, while the applicant self-reported to Dr. Samadi that he had intermittent muscle ache, and that he has a friend with fibromyalgia, Dr. Samadi did not diagnose the applicant with fibromyalgia. Instead, Dr. Samadi opined that she was not sure of the reason for his current symptoms. This is the last entry from Dr. Samadi's office provided by the applicant.
- [36] Contrary to the applicant's arguments, Dr. Ingber did not advise him that his alleged fibromyalgia diagnosis may have been caused by this accident. Instead, on December 31, 2021, the applicant self-reported that he still had chronic pain and was wondering if the accident was the cause of this. Dr. Ingber advised him to speak to his rheumatologist.

- [37] In any event, even if the applicant believed that his chronic pain/fibromyalgia may have been from the accident in December of 2021, this was not included in the previous explanation of April 21, 2022. I am alive to the applicant's position that his representative did not have the medical records until the next day, however the applicant himself was the one who discovered this and decided to pursue a claim, as such, it raises questions of why medical records would be required.
- [38] The applicant's argument is further undermined by the email of February 16, 2023. In this email, it was noted that the applicant sought out legal representation once he discovered his injuries were from the accident. Surely, if this was the case, the applicant would have advised his legal representative from the onset that he was seeking out representation due to his belief that he had chronic pain/fibromyalgia from this accident and wanted to open a claim.
- [39] Finally, I am not persuaded by the applicant's position that s. 258.3 of the *Insurance Act* supports the validity of late claims. While section 258.3(1)(a) states that an applicant shall apply for statutory accident benefits prior to commencing an action, this section of the *Insurance Act*, pertains to civil claims, and has no bearing on the deadlines for submitting an OCF-1 and what constitutes a reasonable explanation. Accordingly, the applicant is bound by the provisions in the *Schedule*, in particular ss. 32(5) and 34.
- [40] Critically, the applicant has not provided an explanation that is credible, as such, there is no need to assess the reasonableness of the explanations provided. In other words, the first principle is a threshold that must be met in order to engage the other principles. As such, I am not persuaded that he provided a reasonable explanation for the delay in submitting the OCF-1.

Section 55

- [41] Pursuant to s. 55(1)1 of the *Schedule*, an insured person shall not apply to the Tribunal under subsection 280(2) of the *Insurance Act* if the insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or has not submitted an application for the benefit within the times prescribed in s. 32.
- [42] As outlined above, I find that the applicant did not submit his completed OCF-1 within the timelines prescribed by the *Schedule* and has not provided a reasonable explanation for the delay. Accordingly, I find that the applicant is statute-barred from proceeding with his application before the Tribunal.

CONCLUSION AND ORDER

[43] The applicant is barred by s. 55(1)1 of the *Schedule* from proceeding with his application before the Tribunal. The application is dismissed. The Tribunal shall vacate any date that has been scheduled for the substantive issue hearing.

Released: March 12, 2024

**Tanjoyt Deol
Adjudicator**