LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: Corry 'Johanna' Van De Werken vs. Heartland Farm Mutual Inc., 2020 ONLAT 19-001892/AABS

Released Date: 04/29/2020
File Number: 19-001892/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:

Corry 'Johanna' Van De Werken

Applicant

and

Heartland Farm Mutual Inc.

Respondent

DECISION [AND ORDER]

ADJUDICATOR: Nathan Ferguson

APPEARANCES:

For the Applicant: Corry 'Johanna' Van De Werken, Applicant
Matthew Snow, Counsel

For the Respondent: Rae Marie Hyde, Adjuster
Rohan Haté, Counsel

HEARD: In-Person: **January 30, 2020**

REASONS FOR DECISION [AND/OR ORDER]

OVERVIEW

[1] The applicant was involved in an automobile accident on January 27, 2016, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). The applicant was denied income replacement benefits and attendant care benefits by the respondent partly on the basis that she did not file for these benefits in time. The applicant submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal") to contest the respondent's decision.

[2] This hearing was set to address only the preliminary issue regarding the timing of the application. The only determination I will make is whether the substantive issues ought to proceed to a hearing, or whether the application is barred by the operation of Section 55 of the Schedule.

[3] For the reasons that follow, I find that the application was filed outside the time limits and that there is no reasonable explanation for the late filing that would justify extending the time in this instance.

PRELIMINARY ISSUES

[4] Is this application statute-barred pursuant to s. 55 of the Schedule because the applicant did not submit her application for benefits within the time prescribed by s. 32 of the Schedule?

REASONABLE EXPLANATION

[5] Section 32(1) of the Schedule requires that an insured person inform the insurer of an accident within seven days. There is no dispute that the applicant did so in this instance.

[6] As a result, the insurer was required to provide her with the application forms for accident benefits. After receiving the forms, Section 32(5) required the applicant to complete and deliver the forms back to the insurer within 30 days. Although there is some dispute as to the receipt of the application forms, I find these were provided to the applicant in a timely fashion on a balance of probabilities. Having received the forms, there is no dispute that the applicant did not return the completed forms to the insurer within 30 days.

[7] Therefore, the applicant relies on the exception outlined in section 34 of the Schedule: “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”.

[8] The respondent argued that there is no reasonable explanation for the delay in submitting the application for benefits. The applicant argued that there are a multitude of circumstances that prevented her from submitting the application within 30 days and that these amount to a reasonable explanation for the delay.

[9] The parties also agreed that the relevant six-part test to apply to the determination of the reasonableness of the explanation for delay is set out in *K.H. v. Northbridge General Insurance Company* (2019 CanLII 101613 (ON LAT)) at paragraph 9:

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 of “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.

[10] As a result of my findings on a balance of probabilities that the applicant did not submit the application for benefits within the time prescribed by the legislation, and that there is no reasonable explanation for the delay in filing, section 55 (1) of the Schedule bars the application and it may not proceed further.

ANALYSIS

[11] The applicant argued that it was unclear when the application forms were received, largely as a result of a disparity in her address as recorded by the

insurer and as she argues it must be written to ensure delivery of mail. The difference is the inclusion of a PO Box number. The applicant asserts that if the PO Box is not included, the mail will not be delivered to her attention and that this may have occurred, although she has no specific recollection of when she received the application forms.

[12] However, the respondent directed me to several sources provided directly by the applicant which do not include the PO Box number as a part of her address. For example, at page 323 of the Respondent's Evidence Brief is a statement provided by the applicant on February 10, 2016 in which she provided her address without a PO Box number. The applicant's OHIP documentation does not include a PO Box number. An Attending Physician Statement the applicant completed and signed (at p.231 of the Respondent's Evidence Brief) does not include a PO Box number.

[13] The respondent did send a letter to the applicant on June 30, 2017 to her address including a PO Box number. The insurer's adjuster testified that this is because shortly before that letter was sent, the applicant advised in a conversation that there ought to be a PO Box number included. The respondent made the change going forward. In light of the applicant's repeated reporting of her address without a PO Box number, I find on a balance of probabilities that the respondent sent the forms to the address the applicant provided. The respondent fulfilled its obligations by sending the forms to the applicant at the address provided.

[14] Additionally, I find it more likely than not that the applicant received these forms. The applicant testified that she had no direct knowledge or recollection of the mail received regarding her application and did not call any other witness that might have provided any insight regarding any difficulty with mail delivery or the receipt of these forms specifically.

[15] The respondent's adjuster testified that she followed ordinary procedures with respect to providing the necessary forms. Specifically, after being notified of the accident, the applicant would be contacted by phone and then sent correspondence including a complete accident benefit package for completion.

[16] The package includes detailed instructions and was sent to the applicant in this instance. Among other things, the letter states that the applicant has 30 days to complete and return the forms and that all claims may be refused if this is not done. The respondent's adjuster confirmed that this letter was sent by mail and was not returned as undeliverable. In addition, an independent adjuster was sent to meet with the applicant to follow up on February 10, 2016.

[17] Additionally, in cross examination, the applicant acknowledged that the address provided to the insurer until June of 2017 did not include a PO Box number and although she testified that the post office is “strict” and will not provide mail if that number is missing, she also acknowledged that she must have received various documents from the insurance company relating to her insurance despite the missing PO Box number before this accident.

[18] The applicant also acknowledged that she likely did not check the mail surrounding the date of the accident and was therefore unaware of whether the forms were received. She could not recall who checked the mail, but she confirmed that the form requiring an election of WSIB or accident benefits arrived by mail and she completed this form.

[19] Although she testified that she did not understand the implications of the election and that this was not discussed with her until she retained her current counsel, the notes provided by the applicant’s social worker and nurses show that this was discussed after the accident and until her release from hospital. In addition to discussing the election, the applicant was provided with a card and encouraged to get assistance on her discharge from the hospital including a list of lawyers she might choose to consult.

[20] On her release from hospital, the applicant had an occupational therapist, KG, attend her home. KG noted that the applicant stated the insurance company was “sending adjuster… have to decide if going WSIB or suing the driver”. This indicates she had some awareness of the need to make an election both while being treated at the hospital and after her discharge as several health practitioners and supports assisted with the process and encouraged her to complete the necessary paperwork regarding the same.

[21] The independent adjuster, TC, also testified at this hearing. TC confirmed that he met with the applicant on February 10, 2016 at approximately 3:00 p.m. The applicant provided a statement to TC at that time. The applicant did not, according to TC’s notes, appear confused or indicate any difficulty with comprehension or understanding.

[22] The forms were not provided by TC, which is not unusual in his experience. The applicant expressed to TC that she was deciding between pursuing a WSIB claim and an accident benefits claim and that she was seeking a lawyer’s advice about this. The statement also indicated that the applicant stated she was waiting on a police determination regarding the accident to make a final election as to which process to pursue.

[23] TC noted that the applicant was given an election form for WSIB or accident benefits and she signed the election to pursue WSIB. TC did not recall any indication that the applicant was not engaged in the process. The applicant was provided an opportunity to review the statement, and signed this statement at the time. The applicant testified that she consulted with her mother about the election and that this was her election at the time.

[24] The applicant now argues the statement is not reliable or accurate. However, I note also that the applicant struggled to provide any specific details or recollections regarding any matter in dispute. In fact, when asked directly about the statement on cross examination, the applicant acknowledged it must be accurate as she signed it.

[25] The applicant argues that her memory is quite poor. She is unable to recall virtually anything from the time period in dispute. For example, the applicant did not recall how or when the insurer was notified of the accident. The applicant was asked if she received the forms in question and replied, “I don’t know”. She was unable to recall if she was helped in applying for WSIB benefits, or how she became aware of these. She was uncertain whether she was advised of accident benefits, but knew of their existence. She was assisted by her mother and sister after the accident. The first she recalled seeing and completing the accident benefit forms was in July 2017, approximately 17 months after these were sent by the insurer.

[26] The applicant acknowledged in cross examination that she was aware of the need to elect a benefit and aware that she could seek legal advice regarding this decision. She confirmed that she did begin that process, but that she did not follow up as a result of poor weather at the time she planned to visit the lawyer’s office.

[27] As a result of her own report that she is unable to clearly recall this time period, I find that her the documentation prepared at the time is likely a more accurate reflection of the facts than her current testimony. This is because her testimony lacks specific information or detail and is several years removed from the relevant time. In addition, she acknowledged that the statements taken at the time are more likely accurate given her own vague recollection. I did not rely on the applicant’s broad assertions that the insurer’s evidence is incorrect as a result.

[28] Although the applicant states that she was in a very confused state at the time she was required to complete the application forms as a result of her use of pain medication, there is no record of the same in any medical document available to

me. The applicant did not report any confusion to any treating practitioner at the time. The applicant also testified that she was able to complete the WSIB forms, and an application for EI, which was "easy" because it was an online form at approximately the same time as the application to the insurer was required to be completed.

[29] In light of this, I find on a balance of probabilities that the applicant's explanation that she was unable to complete the forms as they were not received, or alternatively were not understood, is not credible or believable. The applicant is not a credible or reliable witness – not because I consider her dishonest or disingenuous, but because she testified that she has virtually no recollection of details and admits that the documentation prepared at the time (which suggests she understood this process and proceeded with an application for WSIB rather than accident benefits) must be accurate.

[30] I accept that the applicant was not fully aware of the implications of her election in this matter, but the documents and her testimony confirm that she was aware of the decision, she consulted her mother in making this decision, she planned to see a lawyer about the decision and that she did not do so because the weather was poor, not because of an inability to follow through.

[31] The applicant was encouraged by her social worker, treating nurses, and occupational therapist to get advice and took the first steps toward doing so which confirms she was contemplating the impact of this decision. I find it implausible, then, that she did not receive the documentation from the insurer outlining this process and including the application forms.

[32] The first steps, after discussing the situation with her mother and choosing to pursue WSIB entitlement, that the applicant took to pursuing accident benefits took place after the closure of the WSIB file. That is, only when all other supports were terminated, did the applicant follow through in considering the accident benefits framework. I find it is not a reasonable explanation that the applicant simply did not follow through with evaluating her options for a period of approximately 17 months.

[33] I do accept that the applicant's decision-making capabilities were likely hindered by her psychological distress. However, as noted above, I also find that the applicant had the capacity to seek out help to address the challenges she was facing. Therefore, since she had the capacity to request assistance with these other tasks, it does not then follow that she would be unable to contact a legal representative or other support.

[34] With respect to prejudice, the Financial Services Commission of Ontario has considered this type of delay presumptively prejudicial to an insurer. As outlined in K.H. v. Northbridge, "This presumption makes sense, as significant delays prevent an insurer from requesting contemporaneous, medical examinations and records. This lack of information deprives both parties of accurate information about what effects, if any, an accident has had on an insured person." I agree with this and note that with the passage of time and changes in the applicant's status over that time, it is unrealistic to attempt to identify what the applicant experienced as a result of the accident in the time that has passed. This is further complicated by the applicant's own evidence that she simply cannot recall.

ORDER

[35] I find on a balance of probabilities that the applicant did receive the application forms necessary in this instance and that her explanation for failing to complete and submit these forms in accordance with the legislated timelines is not reasonable. It follows that the applicant is not entitled to proceed with her application for these benefits.

Released: April 29, 2020

Nathan Ferguson
Adjudicator