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: K.R. vs. Certas Direct Insurance Company 2020 ONLAT 19-003237/AABS

Released: May 20, 2020
Tribunal File Number:19-003237/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:

K.R.

Applicant

and

Certas Direct Insurance Company

Respondent

DECISION

PANEL: **Kimberly Parish, Adjudicator**

APPEARANCES:

For the Applicant: Nicole Corriero

For the Respondent: Brittany Tinslay

HEARD: **by way of written submissions**

OVERVIEW

[1] The applicant ("K.R.") was injured in an automobile accident ("accident") on October 26, 2014 and sought benefits from the respondent pursuant to Ontario Regulation 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). The respondent refused to pay for a rehabilitation benefit and the applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of this dispute.

[2] A case conference was held on September 23, 2019 and the parties were unable to resolve their dispute and have proceeded to a written hearing.

ISSUES

[3] The disputed claims in this hearing are:

(i) Is the applicant entitled to a rehabilitation benefit in the amount of $11,865.00 (inclusive of HST) for [The] hockey training recommended by [The] Hockey Training Academy, dated January 8, 2019 and denied by the respondent on January 23, 2019?

(ii) Is the applicant entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits?

(iii) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[4] Based on the evidence before me, and on a balance of probabilities, I find that:

(i) The applicant is not entitled to payment for a rehabilitation benefit in the amount of $11,865.00 (inclusive of HST) for [The] hockey training

recommended by [The] Hockey Training Academy, dated January 8, 2019 and denied by the respondent on January 23, 2019.

(ii) The applicant is not entitled to an award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits.

(iii) As no benefits are found to be owing, no interest is payable.

BACKGROUND

[5] K.R. was the front seated passenger in a vehicle which was proceeding through an intersection when it was struck on the driver's side by another vehicle.

[6] K.R. is 19 years old and prior to the accident, she was actively engaged in playing hockey, a sport which she was very passionate about. It is K.R.'s position that the rehabilitation benefit in dispute is reasonable and necessary. K.R. argues this is so she can regain her physical strength and skill level to enable her to play hockey at the skill level she had attained prior to the accident. She also submitted her goal is to play hockey at the NCAA level and have a career within the industry.

[7] The respondent argues that K.R. is not entitled to payment for the rehabilitation benefit in dispute for three reasons. First, the expense was incurred by the applicant prior to submission to the respondent. Second, the injury to S.K.'s right knee for which the rehabilitation was said to be required is not related to the accident. Third, the rehabilitation itself is not reasonable and necessary.

ANALYSIS

Did the applicant comply with s.38 (2) of the *Schedule?*

[8] I find as a result of the applicant not complying with the requirements set out within s. 38 (2) of the *Schedule*, the invoice in the amount of $11,865.00 is not payable. The applicant incurred the expense for the hockey skills development

training on the invoice dated December 17, 2018 prior to submitting a treatment plan to the respondent for approval. This has resulted in the respondent being unable to assess this benefit to determine if it was reasonable and necessary prior to the applicant incurring the expense.

[9] K.R. seeks payment from the respondent for an invoice, dated December 17, 2018 in the amount of $11,865.00 for hockey skills development training which includes the cost of the ice rental and 50 hours of private skills hockey training. K.W. submitted this was for the purpose of vocational training. She relies on the recommendations of Dr. Zarnett, orthopedic surgeon and her treating physician, Dr. Fagbola. This was supported by them as part of the rehabilitation for her right knee ACL reconstruction and to assist her return to her pre-accident lifestyle. In her submissions, K.R. conceded she submitted the invoice for the hockey skills development training to the respondent on January 9, 2018 and that a treatment plan was not submitted to the respondent prior to her incurring the expense.

[10] The respondent argues pursuant to s.38 (2) of the *Schedule*, the disputed expense is not payable as it was incurred prior to the applicant submitting a treatment plan requesting the rehabilitation. I agree with the respondent for the reasons which I address below.

[11] It is noted within s.38 (2) of the *Schedule* that an insurer is not liable to pay a medical or rehabilitation benefit, or an assessment or examination which was incurred by an insured person prior to the insured person submitting a treatment plan which satisfies the requirements set out within s.38 (3). There are four exceptions noted within s.38 (2), however, I do not find any of those exceptions are applicable in this case.

[12] K.R. submitted this rehabilitation benefit was paid for by her parents to prevent her future career in hockey from deteriorating and to prevent the respondent from having to continue to fund basic physiotherapy treatment. She further submitted the rehabilitation private hockey skills training would be best to accommodate her

injury and "her insurer was notified immediately so as to avoid any prejudice."[1] She submitted that this type of rehabilitation treatment is atypical and is not administered by a Health Claims for Auto Insurance (HCAI) provider and completing the necessary paperwork is not as straightforward as with other treatment measures. K.R. submitted that she did subsequently complete the necessary forms required by the respondent and she then underwent an insurer's examination ("IE"). However, while I am sympathetic that the expenses were incurred by K.R. in an attempt to rehabilitate herself and return to playing hockey at a competitive level, I cannot ignore the clear language within s.38 (2) of the *Schedule*.

[13] The respondent relies on several Tribunal decisions in which the claims for medical benefits and cost of examinations of other insureds were dismissed for failure to comply with the requirements stipulated within s.38 (2) of the *Schedule*[2]. I find these cases are persuasive and the adjudicators who authored those decisions shared very similar findings. When an insured incurs a medical/rehabilitation or an assessment/examination expense prior to submitting a treatment plan to the insurer requesting the specific treatment, it automatically invokes s.38 (2) of the *Schedule*. The respondent is then not liable for paying for the expense.

[14] I find the analogy drawn by adjudicator Truong in paragraph 27 of *V.K. v. Allstate Insurance Company*[3] to be persuasive. The adjudicator noted that the *Schedule* codifies obligations that both the insurer and the insured are required to follow. Therefore, "to require one party to strictly adhere to their obligations while allowing the other party to abandon theirs would be a breach of natural justice and fairness." I find the operation of s.38 (2) of the *Schedule* relieves an insurer from being liable to pay for a medical/rehabilitation or cost of examination

[1] Applicant's initial written submissions, para 40, at 9
[2] 16-001809 *P.K. v. CUMIS General Insurance,* 2017 CanLII 19204 (ONLAT), 17-000121 *T.H. v. The Personal Insurance Company,* 2018 CanLII 76437 (ONLAT), 17-007345 *Applicant v. Certas Home and Auto Insurance Company,* 2019 CanLII 34591 (ONLAT), 16-004273 *V.K. v. Allstate Insurance Company*, 2018 CanLII 61172 (ONLAT), and 16-001756 *G.S. and Aviva Insurance Company of Canada,* 2017 CanLII 33655 (ONLAT)
[3] *Ibid*

expense prior to having an opportunity to review the expense and then determine whether they agree to pay for it. Therefore, I find that the requirements as set out within s.38 (2) are the law and I do not have the discretion to waive them.

[15] The facts are clear in this case. K.R. does not dispute incurring the rehabilitation benefit prior to submitting a treatment plan to the respondent. The respondent initially denied the rehabilitation benefit in an Explanation of Benefits ("EOB") letter dated January 23, 2019 and noted that the hockey skills training is not reasonably required as a result of the injuries K.R. sustained in the accident. A physiatry I.E. report prepared by Dr. R. Williams dated March 4, 2019 was issued. A further EOB letter dated June 23, 2019 was issued by the respondent which further denied the rehabilitation benefit as the respondent's position was that the expense was unrelated to the injuries sustained in the accident. The language within s.38 (2) of the *Schedule* is clear. Therefore, due to K.R.'s non-compliance with s.38 (2), the rehabilitation benefit in the amount of $11,865.00 is not payable. I have made no finding on whether this expense is reasonable and necessary.

Is the Applicant entitled to relief against forfeiture as a result of breaching s.38 (2) of the *Schedule*?

[16] K.R. argues that she is entitled to relief against forfeiture and relies on the *Courts of Justice Act* ("CJA")[4]. It is also noted within s.98 of the CJA that a court may grant relief against penalties and forfeitures, on such terms as to compensation, or as otherwise are considered just. K.R. submitted that this Tribunal has jurisdiction to apply such relief as it applies to all other Acts affecting or relating to the courts and the administration of justice and referenced s.1 (1) of the CJA.[5] K.R. referenced the Ontario Court of Appeal decision, *Kozel v. The Personal Insurance Company*[6] to support her position. The decision dealt with whether the respondent, 77 years old at the time of the accident, was in breach

[4] *Courts of Justices Act,* R.S.O 1990, C.43, s.98
[5] Applicant's reply submissions, at 1
[6] *Kozel v. The Personal Insurance Company,* 2014 ONCA 130 (CanLII), February 19, 2014.

of statutory condition 4 (1) of *Statutory Conditions - Automobile Insurance,* O. Reg 777/93 as her driver's licence was expired for approximately four months when she was involved in an automobile accident. Two issues were addressed by the court. First, was the respondent entitled to a defence of due diligence and second, was the respondent entitled to forfeiture under s.98 of the CJA? The appellant judge found that the respondent was not entitled to the due diligence defence but found she was entitled to relief from forfeiture. The decision noted an enormous disparity existed as the respondent could potentially lose $1,000.000.00 coverage in insurance benefits, while the insurance company would not suffer any prejudice as a result of the statutory breach of s. 4 (1). K.R. argues that *Kozel* is analogous to this case, as K.R.'s breach was incidental and less serious than driving with a suspended driver's license.

[17] I find the Tribunal does not have the jurisdiction to grant relief from forfeiture for the following reasons. First, the applicant references s.1 (1) and s. 98 of the CJA to support its position that this Tribunal has the jurisdiction to grant relief from forfeiture. I disagree with the applicant's submission. I find s.1 (1) of the CJA is a definitions section and neither "court" or "tribunal" are defined within that section. It is s.1 (2) of the CJA which references the "application to other Acts affecting or relating to the courts and the administration of justice" and I do not find this section applicable to tribunals as it relates to s.98 of the CJA. I find s.98 of the CJA does not grant tribunals the jurisdiction to grant relief against forfeiture. Although s.98 of the CJA addresses relief against forfeiture, it specifically notes that a "court" may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. I interpret this to mean that the legislature did not intend for s.98 to be available to a tribunal as court is explicitly noted while tribunal is not. For example, s.109 (6) of the CJA notes that notice of a constitutional question must be filed for proceedings with boards and tribunals, as well as to court proceedings. I find this establishes there was a deliberate choice by the legislature to explicitly spell out a provision that applies to both courts and tribunals, while implicitly recognizing that one is not the same

as the other. However, if I am incorrect about jurisdiction, I have declined to grant K.R. relief from forfeiture for the reasons I outline below.

[18] I disagree with K.R.'s analysis and I find *Kozel* is not analogous to this case. The circumstances and facts of the case vastly differ from this present case. The respondent in that case was 77 years old at the time of the accident and the act of failing to renew her driver's license was determined by the judge to be the result of an oversight and not a deliberate act, which I accept may also be the case with K.R. However, the subject accident which K.R. was involved in occurred slightly more than 4 years prior to her incurring the rehabilitation benefit for the hockey skills training. K.R. had received funding for prior treatment within the four years since the accident. K.R. would have had to submit treatment plans to the respondent when requesting treatment. Therefore, I find the process of submitting treatment plans prior to receiving treatment was not a new process for K.R. While I accept that the hockey skills training may be atypical treatment following a motor vehicle accident and the provider was not registered through HCAI, it does not reverse the requirements set out within s.38 (2). It is clear in *Kozel* that if relief from forfeiture had not been granted, the prejudice to the respondent would have outweighed any prejudice to the insurer. I find in this case, K.R. already had access to medical and rehabilitation benefits which she had been accessing for four years prior to incurring the rehabilitation benefit. I find the respondent would incur prejudice if it were required to pay the rehabilitation benefit claimed. The respondent could not assess this benefit prior to it being incurred. As a result, they could not make a determination on whether they agreed to pay for it, a right which they are afforded to by law under s. 38 (2) of the *Schedule*.

[19] K.R. also relies on another Ontario Court of Appeal decision, *Attorney General of Ontario v. 8477 Darlington Crescent*[7] which relied on the four factors as identified

[7] *Attorney General of Ontario v. 8477 Darlington Crescent*, 2011 ONCA 363 (CanLII), May 10, 2011, paras 88, 89

within *Saskatchewan River Bungalows Ltd. v. Marline Life Assurance Co*.[8] regarding when to exercise power to grant relief against forfeiture. The four factors include: conduct of the applicant, gravity of the breaches, and the disparity between the value of the property forfeited, and the damage caused by the breach. K.R. emphasizes the reasonableness test as referenced in *Attorney General of Ontario* in which Justice Doherty noted that the reasonableness of the breaching party's conduct needs to be considered as it relates to all facets of the contractual relationship, including the breach in issue, and the aftermath of the breach. Justice Doherty also noted power to grant relief from forfeiture is discretionary and fact specific. He further noted: "*Relief from forfeiture is granted sparingly and the party seeking that relief bears the onus of making the case for it…"*[9]

[20] I agree with Justice Doherty that relief from forfeiture should be rarely granted. I also do not find K.R. has met her onus that her case is one which should be granted relief from forfeiture. I do not accept K.R.'s argument that because the rehabilitation benefit was atypical and not administered through an HCAI provider this made submitting the paperwork and complying with the *Schedule* not as straightforward as applying for other treatment measures. As I have already noted, K.R. had treatment previously funded by the respondent over four years. Therefore, submitting treatment plans to request treatment from the respondent was not new to K.R. As I already noted above, by incurring the rehabilitation benefit and then requesting the respondent to pay for it, places prejudice on the respondent which I find outweighs the prejudice to the applicant. Further, the operation of s.38 (2) of the *Schedule* would have served no purpose.

[21] K.R. also relies on the Ontario Superior Court decision, *Monico v. State Farm Mutual Automobile Insurance Company*[10] in which the insured failed to comply with the statutory reporting requirements of the *Insurance Act*[11] and the

[8] *Saskatchewan River Bungalows Ltd. v. Marline Life Assurance Co.* [1994] 2 S.C.R. 490, at 504
[9] *Supra,* note 4 at 60, 61
[10] *Monico v. State Farm Mutual Automobile Insurance Company*, 2015 ONSC 2697
[11] *Insurance Act*, R.S.O. 1990, C. I.8

applicable statutory accident benefits schedule. The insured was found to have committed a substantial breach when the insured was involved in a hit a run but failed to take the necessary steps to try and identify the perpetrator and had also failed to inform the insurer. In the case before me, K.R. argues her breach was less substantial as it was a technical breach, constituted by a lack of paperwork. I do not accept K.R.'s argument. I find as a result of the proper steps not being followed by K.R. and her choosing to incur the rehabilitation benefit prior to submitting a treatment plan to the respondent, it has deprived the respondent of their statutory right under s.38 (2).

[22] For the reasons I have noted above, I find K.R. is not entitled to receive payment for the rehabilitation benefit in the amount of $11,865.00 due to non-compliance with s. 38 (2) of the *Schedule*. I find the Tribunal does not have the jurisdiction to grant relief from forfeiture*,* and in case I am incorrect on the jurisdiction issue, I have provided my reasons for finding K.R. is not entitled to relief from forfeiture. As I have determined that K.R. is not entitled to the rehabilitation benefit due to non-compliance with s.38 (2), I need not address the issue of causation raised by the respondent.

Is the applicant entitled to an award pursuant to *Ontario Regulation 664*?

[23] I find the applicant is not entitled to an award. I do not find the applicant has met her burden of proof that the respondent acted unreasonably or delayed payment of any accident benefits.

[24] It is noted within *Ontario Regulation* 664[12] that if the Tribunal finds that an insurer had unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled, may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award with interest.

[12] *Ontario Regulation 664,* R.R.O. 1990, Reg. 664

[25] It is argued by K.R. that the respondent withheld payment of this benefit and therefore the respondent should be required to pay her an award. K.R. argues the respondent focused on her right knee injury and raised that it was not caused by the accident. K.R. lastly submits that because the respondent interpreted causation in the strictest sense, this resulted in "denied funding of the proposed treatment plan, leaving K.R. and her family without a remedy for over a year."

[26] I find that K.R. is not entitled to an award. I have already found K.R. is not entitled to the benefit in dispute. I have found the rehabilitation benefit is not payable due to K.R.'s non-compliance with S.38 (2) of the *Schedule* and consequently the respondent is not liable to fund the benefit. Therefore, I do not accept that the respondent maintaining their position that the injuries with her right knee were not causally related to the accident support that the respondent unreasonably withheld or delayed payment of the benefit to K.R.

CONCLUSION

[27] Therefore, I find the applicant is not entitled to receive the following:

(i) A rehabilitation benefit in the amount of $11,865.00 (inclusive of HST) for [The] hockey training recommended by [The] Hockey Training Academy, dated January 8, 2019 and denied by the respondent on January 23, 2019.

(ii) An award under *Ontario Regulation 664* because the respondent unreasonably withheld or delayed the payment of benefits.

(iii) As no benefits are found to be owing, no interest is payable.

[28] The applicant's claim is dismissed.

Released: May 20, 2020

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Kimberly Parish
Adjudicator