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

Ontario

Tribunal File Number: 17-001090/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:

Amanda McCready

Applicant

and

Certas Home and Auto Insurance Company [formerly State Farm Insurance]

Respondent

DECISION

ADJUDICATOR: Catherine Bickley

APPEARANCES:

For the Applicant: Iman Ahsan, Counsel

For the Respondent: Jonathan Shreider, Counsel

Dunja Mullan, Representative

HEARD: **August 14, 15, 16 (in person) and August 18 (by teleconference)**

OVERVIEW

[1] The applicant, A.M., was involved in a motor vehicle accident on March 26, 2011, and sought benefits from her insurer, Certas Home and Auto Insurance Company, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). Certas paid A.M. income replacement benefits ("IRBs") for more than two years. Following Certas' July 2016 decision to stop paying IRBs and seek repayment, A.M. submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[2] A.M. and Certas each believe they are owed money by the other. Specifically, A.M. seeks income replacement benefits from December 22, 2013 to date and ongoing (minus amounts already paid) while Certas seeks repayment of over $16,000.00 in IRBs paid between June 2015 and June 2016. A.M. also says Certas should be ordered to pay her an award because it unreasonably withheld or delayed payment of her benefits. For its part, Certas says A.M. should be ordered to pay it costs.

[3] A.M. testified at the hearing. Her sister, M.K, and her treating psychologist, Dr. Jeremy Frank, also testified on her behalf. Certas called Dunja Mullan (litigation claims advisor) and Dr. Isabelle Cote (psychiatrist).

ISSUES TO BE DECIDED

[4] The following are the issues to be decided:

1. Does the doctrine of issue estoppel prevent A.M. from bringing this application?
2. If the answer to 1 is no, is A.M. entitled to IRBs of $323.83 per week from December 22, 2013 to date and ongoing?
3. Is Certas entitled to repayment of $16,441.54 (IRBs from June 21, 2015 to June 21, 2016)?
4. Is A.M. entitled to interest on any benefits payable?
5. Is Certas liable to pay an award under section 10 of Regulation 664 enacted under the *Insurance Act* because it unreasonably withheld or delayed payments to A.M.?
6. Is Certas entitled to a cost award pursuant to Rule 19?

RESULT

[5] Based on the totality of the evidence and the parties submissions, I find the following:

1. The doctrine of issue estoppel does not prevent A.M. from bringing this application.
2. A.M. is not entitled to IRBs from December 22, 2013 to date and ongoing.
3. Certas is not entitled to repayment of IRBs for the period between June 21, 2015 and June 21, 2016.
4. A.M. is not entitled to any interest.
5. Certas is not liable to pay an award.
6. Certas is not entitled to a cost award.

ANALYSIS AND DECISION

1. The doctrine of issue estoppel does not prevent A.M. from bringing this application

[6] Certas submits that A.M. can not bring this application because the key issue of causation, i.e., whether her injuries were caused by the March 2011 accident, has already been decided in a May 2017 decision[1] of the Financial Services Commission of Ontario ("FSCO"). That decision determined that A.M. had not sustained a catastrophic impairment as a result of the March 2011 accident. Certas argues that the doctrine of issue estoppel[2] applies. A.M. asserts that Certas should have raised issue estoppel as a preliminary issue rather than for the first time in its closing submissions.

[7] Certas stated on the first day of the hearing that the May 2017 FSCO decision was persuasive but not binding on the Tribunal. In its closing submissions, Certas -- for the first time -- argued that A.M. should be prevented from bringing her application due to the FSCO decision.

[8] The application of issue estoppel is discretionary. I find that it is not appropriate to exercise my discretion to apply the doctrine in this case.

[9] I am influenced by Certas' last-minute reliance on the doctrine. The FSCO decision was issued on May 1, 2017. The case conference was held on June 16, 2017. Certas could have and should have raised issue estoppel as a preliminary issue at the case conference. Not only did Certas not do so, it shifted its position between its opening submissions on August 14, 2017 and its closing submissions two days later.

[1] [A.M.] v. State Farm Mutual Automobile Insurance Company FSCO A15-006980 (Jeff Musson, May 1, 2017)

[2] The Supreme Court of Canada has set out three pre-conditions required before issue estoppel can be invoked:

- The issue must be the same as the one decided in the prior decision
- The prior judicial decision must have been final
- The parties to both proceedings must be the same, or their privies

(Toronto (City) v. C.U.P.E. [2003] 3 S.C.R. 77 at 95)

[10] Further, while FSCO decisions are not binding on the Tribunal, I find persuasive the reasoning in *D.S. v. Wawanesa.*[3] In that decision, the adjudicator noted that issue estoppel is "not an easy fit in the world of accident benefits" where multiple proceedings are common. Finality, while an important value, must be balanced against important policy concerns such as consumer protection, compensation of accident victims, and allowing a dispute to be heard on its merits.[4]

[11] Finally, I note that a tribunal's governing statute may specifically provide for dismissal where the substance of an application has already been dealt with in another proceeding[5]. It was open to the legislature to include such a provision in the *Insurance Act* or the *Schedule*. It did not do so.

[12] For all of these reasons, I conclude that the existence of the May 2017 FSCO decision does not prevent A.M. from bringing this application. I turn now to the merits of A.M.'s request for IRBs.

2. A.M. is not entitled to IRBs from December 22, 2013 to date and ongoing

[13] The *Schedule* provides that an insured person who is employed at the time of an accident is entitled to received IRBs if as a result of and within 104 weeks after the accident she suffers a substantial inability to perform the essential tasks of that employment. The key issues in this case are whether A.M.'s substantial inability is caused by the accident and whether that substantial inability arose within 104 weeks of the accident, i.e., before March 11, 2013.

[14] A.M. relies on a Tribunal decision[6] in which the adjudicator ruled that the *Schedule* does not require an individual to apply for an IRB within 104 weeks of the accident. That does not change the requirement that the substantial inability must manifest during those first 104 weeks[7].

[15] The evidence that A.M. had a substantial inability during the first 104 weeks is scant. She returned to work within a few days of the accident. Her family doctor's clinical notes and records have notations of pain for only a relatively short time following the accident.[8] There are also significant inconsistencies between A.M.'s evidence at this hearing and other statements she has made about her health. A.M. has not persuaded me that she had a substantial inability to perform

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[3] A14-007665, February 3, 2017. See also: *Zurich v. Stelzer* P02-0035, February 6, 2004.
[4] *D.S. v. Wawanesa,* page 9.
[5] S.45(1) of the *Human Rights Code,* R.S.O. 1990, c.H.19 as amended, provides that the Human Rights Tribunal of Ontario "may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application."
[6] *16-0000726 v. Aviva Insurance Company of Canada*.
[7] *Wadhwani v. State Farm*, 2013 ONCA 662.
[8] Clinical Notes and Records of Dr. Koole, Exhibits 1 and 1A, Applicant's Document Brief, Tab E2, and Respondent's Document Brief, Tab 3.

the esssential tasks of her employment prior to December 22, 2013 (two years and nine months after the accident).

Pre-accident employment

[16] Before the accident, A.M. worked part-time as a dietary aide in a long term care home. She testified that her job included preparing food, bringing food to residents and feeding some residents. She also operated industrial washing machines and mopped floors.

[17] The dietary aide job description describes the work as physically demanding and primarily peformed while standing or walking. It states that pushing the food carts is an occasional task and describes the usual carrying of objects to be up to 3 kg with occasional unassisted lifting of objects up to 12 kg.[9]

Post-accident employment

[18] A.M. missed only a few days of work after the accident. In September 2012, she started a PSW training program. She took a leave from work between January 2, 2013 and May 1, 2013. I find that A.M.'s difficulty in balancing work, study and parental responsibilities prompted this leave. After finishing the PSW program in May 2013, A.M. continued to work for the same employer but in a new role as a PSW. In July 2013 she began to work full-time hours. She stopped working in December 2013 due to experiencing severe back pain after bending over in the shower.

A.M. did not experience a substantial inability during the first 104 weeks post accident

[19] A.M. testified that after the accident she could no longer mop floors or do dishes. Although her employer did not allow her modified duties, her supervisor accommodated her and co-workers helped her with the heavier tasks. She focused on the lighter duties such as setting tables and giving food to the residents. Her sister's testimony regarding her duties and the assistance that co-workers provided generally supported A.M.'s testimony.

[20] As noted above, except for a short leave while pursuing her PSW studies, A.M. continued to work until December 2013.

[21] Dr. Cote was qualified as an expert in psychiatry. She testified, consistent with her May 2014 report, that when she assessed A.M., her symptoms were severe enough that she could not function occupationally. She also testified that it was after A.M. stopped working in December 2013 that "things went downhill". Her

[9] Exhibit 2, Personnel File, Applicant's Document Brief, Tab B4.

testimony does not assist A.M. in establishing that she experienced a substantial inability before December 2013 (several months past the 104 week point).

[22] Dr. Frank testified as A.M.'s treating psychiatrist. He did not see A.M. until February 2015. As a result, I found his testimony of no assistance.

[23] The medical imaging submitted by A.M. was likewise of little assistance as the imaging taken shortly after the accident reveals no significant issues[10] and the remaining imaging was taken years after the accident.

[24] A.M. has made several statements about her health that are inconsistent with her evidence at this hearing. For example:

- On a January 2014 application for Employment Insurance, she checked "no" in response to the question "Do you have an injury as the result of a motor vehicle accident?"[11].
- On her 2012 application to a PSW training program, A.M. answered no when asked whether she had any physical disabilties or required any accommodation.[12]
- Dr. Ko (who performed an assessment in A.M.'s tort proceeding) quotes A.M. as saying "the last time I felt 100 percent healthy was in 2013"[13].

[25] In addition, as part of A.M.'s application to a PSW training program, her family doctor verified in August 2012 that she could meet the physical demands of a PSW job including lifting, carrying and shifting up to 25 kg.[14]

[26] Further, A.M.'s statements in a June 2016 affidavit[15] (sworn in support of a motion in her tort proceeding) vary significantly from her evidence at this hearing. These statements include:

- Following the accident, she could manage her work duties "fairly well, although I may from time to time have asked a colleague to help me with heavier tasks".
- "While I still had occasional neck, shoulder and back pain [after August 2011] it was by no means debilitating. I was able to work, socialize and to raise my young daughter as a single parent despite the injuries."

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[10] March 26, 2011 x-rays of A.M.'s left shoulder, left ankle, pelvis, left hip, left scapular, cervical, thoracic and lumbar spine, Hamilton Health Sciences, Applicant's Document Brief, Tabs F2 through F6.
[11] Exhibit 3, Employment Insurance File, Applicant's Document Brief, Tab I3.
[12] Exhibit 25, Application, August 15, 2012, Everest College File.
[13] Exhibit 9, Transcript, January 9, 2017, pages 39 to 41. A.M. denies making this statement. Given the general lack of credibility in her evidence, I conclude that the quote from Dr. Ko is accurate.
[14] Exhibit 10, Personal Support Worker Program Admission Form, August 30, 2012 [Attachment to Affidavit, June 27, 2016 (CV-14-509813/CV-14-516401)].
[15] Exhibit 10, Affidavit, June 27, 2016 (CV-14-509813/CV-14-516401).

- "[M]y medical concerns during the period following my accident were not primarily about my accident related injuries."
- After she started working fulltime as a PSW in July 2013, she noticed an increase in physical pain. It remained manageable until December 2013 when she experienced severe back pain while bending over in the shower.
- Although she had migraine headaches before December 2013, they were not severe enough to prompt a specialist referral until after December 2013.
- She deteriorated psychologically after December 2013.

[27] A.M.'s family doctor referred her to a number of specialists after December 2013. The referrals do not mention the accident as the cause of the back pain.[16]

[28] A.M. testified that if she had not been in the accident in March 2011 she would not have had the back issues in the shower in December 2013. Assuming, without deciding, that she is correct the fact remains that to qualify for IRBs she must establish that she experienced a substantial inabilty to perform the essential tasks of their pre-accident employment during the first 104 weeks after the accident. She has not done so. Thus, she is not entitled to IRBs.

3. Certas is not entitled to repayment of IRBs from June 21, 2015 to June 21, 2016.

[29] The *Schedule* permits an insurer to seek repayment of benefits that are paid "as a result of an error on the part of the insurer"[17].

[30] Certas paid A.M. IRBs starting in June 2014 (retroactive to December 2013). It gave A.M. notice in July 2016[18] that the payment was in error. Section 52 of the *Schedule* limits Certas to potential repayment of benefits paid in the twelve months prior to the repayment notice.

[31] I find that Certas is not entitled to repayment. First, I find that the IRBs were not paid "in error" and thus the repayment obligation does not apply. Second, I accept A.M.'s argument that Certas is estopped from seeking repayment.

The decision to pay IRBs was not an error

[32] Certas offered the following unattributed definition of an error:

- The state or condition of being wrong in judgment.

[16] Exhibits 1 and 1A, Dr. Koole's clinical notes and records.
[17] S.52(1)(a) of the *Schedule.*
[18] Exhibit 22, Explanation of Benefits, July 6, 2016, Applicant's Document Brief, Tab B6.

[33] Certas acknowledged during its closing submissions that it had considered, "perhaps thoroughly", the issue of IRB eligibility and had still decided to pay them. It now characterizes that decision as an error. It argued that an insurer could commit an error even through deliberate action, having sought the opinion of professional advisors. It doesn't matter how many people "sat around and made this decision"; even if the decision was made based on legal advice, says Certas, that advice was wrong.

[34] A review of the adjuster's log notes provides some insight into Certas' decision making process.

[35] The log notes of May 29, 2014 state that the onset of A.M.'s disability was December 22, 2013 and "insd [sic] should have been advised that she is not eligible to receive IRBs as per s.5(1)(i)." But, "because SF set up IEs, will await results of reports."[19]

[36] A further entry on June 11, 2014 states that A.M. "did not qualify for IRBs in the first place" but notes that because IEs were set up and one of them supports IRBs, the benefit will be paid.[20] The remainder of the note is redacted.

[37] Log notes on June 12, 2014 state that based on a "verbal legal opinion" and a discussion with the team manager, IRBs would be paid.

[38] Dunja Mullan (litigation claims advisor) testified that it was only during preparation for litigation about A.M.'s application for a catastrophic impairment determination that Certas noted the error, i.e., that the onset of disability was not within the initial 104 weeks. This testimony is inconsistent with the log notes. I prefer the log notes which reveal the considered decision made by Certas to pay IRBs to A.M. despite knowledge that she did not meet the entitlement criteria. I conclude that Certas only decided to correct the "error" when it was engaged in litigation with A.M.

[39] I have subsequently found that A.M. has not met her onus to establish eligibility for IRBs during the period in question. That does not change the fact that Certas made a deliberate decision to pay IRBs notwithstanding its knowledge that they were not payable.The adjuster's log notes reveal that A.M.'s lack of eligibility for IRBs was known. There were repeated discussions within Certas. A decision was made to pay IRBs. This was not an error. It was a strategic decision.

[40] For all of these reasons, I find that the IRBs were not paid to A.M. in error.

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[19] Exhibit 21, Adjuster's Log Notes, p.21, May 29, 2014.
[20] Exhibit 21, Adjuster's Log Notes, p.20, May 29, 2014.

Certas is estopped from seeking repayment of 12 months of IRBs

[41] A.M. submits that Certas is estopped from seeking repayment of IRBs. Certas questions whether the Tribunal can consider the estoppel argument. It has not, however, directed me to any authority on this point. Further, Certas itself relied on a form of estoppel in arguing that A.M. was barred from bringing this application.

[42] Much of the discussion above regarding "error" is applicable to consideration of A.M.'s estoppel argument. The log notes reveal that Certas was aware of issues with A.M.'s IRB eligibilty as early as May 2014 (before any IRBs were paid) and decided nonetheless to make the payments. Certas acknowledges that the evidence shows that it looked closely at the issue of eligibility, strategized and made a determination to pay the IRBs even though it was aware of the eligibility issue. Certas did not tell A.M. that there was an issue regarding eligibility even when she phoned to inquire about the status of her application for IRBs.[21]

[43] Certas also provided A.M. with two OCF-9s (Explanation of Benefits) stating that she "suffers a complete inability from returning to work".[22]

[44] A.M. relied on Certas' representations that she was entitled to receive IRBs. She testified that if she had known that she would have to repay the money, she probably would not have accepted the money and would not have spent it.

[45] For all of these reasons, I conclude that A.M. does not have a repayment obligation.

Interest

[46] Since I have found no benefits payable, A.M. is not entitled to any interest.

A.M. is not entitled to an award under Regulation 664

[47] A.M. requests an award under section 10 of Regulation 664 enacted under the *Insurance Act* but makes no submissions in support of this request. Further, no benefits have been found payable. I find that A.M. has not established entitlement to an award under Regulation 664.

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[21] Exhibit 21, page 21.
[22] Exhibit 21, page 19.

Certas is not entitled to costs

[48] Rule 19 permits a party to request costs if it believes another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. The award of costs under Rule 19 is a discretionary remedy made only in exceptional circumstances.

[49] Certas submits that A.M.'s decision to call Dr. Frank to testify was unreasonable. While I did not find Dr. Frank's testimony to be helpful, I am not convinced that calling him was so unreasonable as to warrant an award of costs.

CONCLUSION

[50] For the reasons set out above, I find that A.M. is not entitled to:

- IRBs from December 22, 2013 to date and ongoing
- interest, or,
- an award under section 10 of Regulation 664 enacted under the *Insurance Act.*

[51] I also find that Certas is not entitled to:

- repayment of IRBs from June 21, 2015 to June 21, 2016, or,
- costs

ORDER

[52] The Tribunal orders that the application is dismissed.

Released: **December 27, 2017**

Catherine Bickley,
Adjudicator