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

Date: 2017-11-17
Tribunal File Number: 17-006816/AABS
Case Name: 17-006816 v Co-operators General Insurance Company

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:

H. L.

Applicant

and

Co-operators General Insurance Company

Respondent

MOTION DECISION

ADJUDICATOR: **Cezary Paluch**

APPEARANCES:

For the applicant: Nick Hamilton, Counsel

For the respondnent: David Raposo, Counsel

Date of Decision: **November 15, 2017**

OVERVIEW:

[1] The applicant was injured in an automobile accident on February 20, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*").

[2] On June 14, 2016 the applicant filed an Application to the Licence Appeal Tribunal – Auto Accident Benefits Service (the "Tribunal") requesting various medical benefits and ongoing non-earner benefits (the "First Application"). The parties could not resolve the matter at a case conference and the matter proceeded to a written hearing.

[3] In Tribunal Decision released on January 12, 2017, Adjudicator Sewrattan found that the applicant's alleged injuries fell within the definition of "minor injury" contained in the *Schedule* and dismissed the First Application on all issues.[1] The applicant appealed this decision to the *Divisional Court*. On June 9, 2017, the unanimous court dismissed the appeal holding that the adjudicator property applied the law to the facts of the case and chose an outcome that was within a range of possible acceptable outcomes.[2]

[4] The applicant than filed another Application to the Tribunal received on October 11, 2017 with the sole issue being a treatment plan for psychological counselling in the amount of $4,678.40 (the "Current Application").

[5] On October 25, 2017, the respondent forwarded a letter to the Tribunal requesting that the Current Application be dismissed as it is frivolous and vexations as the main issue, that the applicant's injuries are within the Minor Injury Guideline ("MIG"), has already been determined in a prior Application #16-000714.

[6] On November 1, 2017, the respondent filed a Response, on a without prejudice basis, again reiterating their view the second Current Application is "*Res Judicata*" and should be dismissed. With respect to the medical benefit, the respondent denied the request based on the treatment plan exceeding the minor injury guideline of $3,500.00 which has already been exhausted (as the injuries continue to fall within the MIG) and therefore no further coverage is available.

[7] On October 30, 2017, the Tribunal issued Notice of a Written Hearing to the parties that a written hearing will be held on November 8, 2017, to determine the respondent's request to have the application dismissed based on *res judicata* and that the parties file any written submission on or before November 8, 2017.

[1] *16-000714 v Co-operators General Insurance Company*, 2017 CanLII 1554 (ON LAT).
[2] *Liu v The Co-operators General Insurance Company*, 2017 ONSC 3599 (CanLII).

[8] On November 9, 2017, the applicant filed a reply to the respondent's motion requesting a declaration that the Current Application is not *res judicata* as the preconditions have not been met. Alternatively, even if the preconditions have been met, the doctrine of *res judicata* ought not to apply in the context of disputes for accident benefits.

[9] On November 9, 2017, the respondent filed Reply submissions, which were further followed by a reply to the respondent's reply on the same day. I have considered all of the written materials filed.

RESULT:

[10] The applicant is not prevented at this time with proceeding with the Current Application before the Tribunal.

[11] No costs shall be awarded at this time. The issue of costs regarding this motion can be raised by the applicant at the hearing and will be dealt with by the hearing adjudicator.

ANALYSIS AND REASONS:

[12] The motion was heard in writing. These are the reasons for my decision.

Request to dismiss the application

[13] It is well accepted that the doctrine of *res judicata* operates to preclude a party from re-litigating issues (other than through an appellate process) which have been resolved by a final judgement on the merits by a court or tribunal of competent jurisdiction.

[14] In *16-003909 v Aviva Insurance Canada*[3], the Tribunal appropriately explained the doctrine of *res judicata* at para. 15 as follows:

> It is generally accepted that there are four prerequisites to be established before a finding of *res judicata* may be made:
>
> 1. The two actions must involve the same parties;
> 2. The claim sought to be asserted must have been within the prior court's jurisdiction;
> 3. Prior adjudication must have been on the merits; and
> 4. The prior decision must have been a final judgment.

[3] *16-003909 v Aviva Insurance Canada*, 2017 CanLII 59502 (ON LAT).

[15] Although the parties are the same, the First Application was heard on its merits and was a final decision of the Tribunal and file was closed; the only claim in dispute appears different on its face. In the Current Application, clearly under the heading "*Issues on Dispute*", on page 3, the issue is listed as a "Medical Benefit" for psychological services in the amount of $4,678.40, submitted to the insurer on September 22, 2017. This issue was not part of the First Application or before Adjudicator Sewrattan.

[16] The respondent has acknowledged that although it is a new treatment plan that is in dispute as part of the Current Application, the underlying sub-issue of the MIG, which is a prerequisite to the treatment plan and has already been decided by the Tribunal, still remains. Indeed, I note that on page 3 of the Current Application, to the question: "*Does the dispute involve whether or not the Claimant's injuries fall within the Minor Injury Guideline (MIG)?"* the applicant has checked off "yes" indicating that MIG remains in dispute.

[17] However, I am also mindful of the Tribunal's standard practice that once an application has been filed, a case conference is scheduled to allow the parties to meet and identify the issues and exchange disclosure. At this point, I cannot say for certain what the issues in dispute are. More importantly, for the purposes of this motion, I cannot state with any certainty whether the claim is the same, or is different, and therefore estopped by the doctrine of *res judicata*.

[18] One of the purposes of a Case Conference is to identify issues in dispute and for the case conference adjudicator to issue an Order clearly setting out the issues in dispute as well as identifying any preliminary issues. It may be that once this matter gets to a case conference stage, and if compelling medical evidence is received, MIG may not be at issue any longer. The determination that the MIG applies to an applicant's injuries is not a static one. An applicant's condition may decline, additional injuries or conditions related to the accident may develop, etc.

[19] The related issue is also whether there is new medical evidence that may take the applicant out of the MIG. The applicant submits there is "substantial new medical evidence which has arisen since the previous MIG decision was rendered." A letter from the respondent dated October 3, 2017 states that "once we are in receipt of your updated family physician medical notes and records…we will review your file again and provided a determination on whether this OCF-18 is reasonable and necessary." On the other hand, the respondent submits that the applicant's submission do not point to any new medical evidence since the matter was decided by the Tribunal.

[20] The purpose of this motion is confined to the whether or not the principal of *res judicata* precludes the applicant from proceeding with his application, it is not to determine the substantive issue in dispute, which is the applicant's entitlement to psychological treatment. I have no medical evidence before me to determine the substantive issue in dispute and it is beyond the scope of this motion for me to do

so. I find that the motion is premature. In fairness to both parties, I am unable to dismiss this application. The applicant is entitled to move forward with his application and the matter to proceed to a case conference.

[21] Finally, I also point out that although the *Divisional Court* clearly denied the applicant's appeal it did not explicitly say that MIG did not apply. In my view, the court did not make a finding of fact on the MIG issue as the respondent argues. Rather, as it was an administrative law decision, it considered the applicable standard of review of reasonableness and held that this standard was within the range of possible outcomes.

[22] Based on the above reasons, to deny the applicant at this early stage, the opportunity to proceed with the current Application would not be fair to the applicant. Especially given that a case conference has not yet taken place and the issues in dispute have not been formally identified and enumerated as part of an order. The current Application will proceed to a case conference.

Costs

[23] The applicant has requested costs for this motion. Given my decision, the issue of costs of this motion can be raised by either party to the hearing adjudicator.

Released: November 17, 2017

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Cezary Paluch, Adjudicator