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

Tribunal File Number: 18-003084/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

Xiu Zhen Sun

Applicant

and

Primmum Insurance Company

Respondent

REASONS FOR DECISION AND ORDER

ADJUDICATOR: **Sandeep Johal**

APPEARANCES:

Counsel for the Applicant: Philip Kai Kwong Yeung

Counsel for the Respondent: Carol-Anne Wyseman

Heard in writing on: **December 14, 2018**

OVERVIEW

[1] The applicant was injured in an automobile accident on May 4, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*).

[2] The applicant applied for a non-earner benefit, an attendant care benefit and several treatment plans and a cost of examination which were denied by the respondent. The applicant disagreed with the decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] The parties participated in a case conference on May 25, 2017 at which time the applicant withdrew her claim for a non-earner benefit and the cost of examination and the attendant care issue and the treatment plans in dispute were settled.[2]

[4] The parties signed and executed a Release and Settlement Disclosure Notice dated June 5, 2017 (the "Settlement Agreement") with respect to the attendant care and treatment plans in dispute.

[5] On April 10, 2018 the applicant commenced a new application to the Tribunal to dispute the respondent's denial for additional benefits and on June 29, 2018 the applicant wrote to the Tribunal to add the issue of attendant care once again.

[6] A case conference took place on October 19, 2018 and the respondent raised a preliminary issue that the applicant was precluded from claiming an attendant care benefit and a medical benefit dated March 3, 2016 as a result of the Settlement Agreement the parties entered into on June 5, 2017.

PRELIMINARY ISSUE TO BE DECIDED

[7] The following is the preliminary issue to be decided as set out in the case conference order dated November 2, 2018:

i. Is the partial final release and settlement disclosure notice signed by the applicant on June 5, 2017 a binding settlement?

ii. If it is determined that it is a binding settlement, is the applicant precluded from proceeding to a hearing on the following issues in dispute:

[1] O. Reg. 34/10.
[2] Tribunal Order dated June 12, 2017.

a. Is the applicant entitled to payments for the cost of examination in the amount of $1,800.00 for an attendant care assessment (Form 1), recommended by Perfect Physio & Rehabilitation Centre in a treatment plan dated August 18, 2017, and denied by the respondent on August 30, 2017?

b. Is the applicant entitled to attendant care benefits in the amount of $189.00 for the period August 1, 2017 - August 31, 2017?

c. Is the applicant entitled to attendant care benefits in the amount of $108.00 for the period December 1, 2017 – December 31, 2017?

d. Is the applicant entitled to receive a medical benefit in the amount of $3,844.66 for medical treatment the applicant received in China, submitted to the respondent on an OCF-6 on March 3, 2016, and denied by the respondent on March 7, 2017?

RESULT

[8] It is my finding that the June 5, 2017 Settlement Agreement with respect to the ACB was a mutual mistake and was not what the parties had intended. The applicant shall return the ACB settlement funds to the respondent prior to commencing a dispute resolution at the Tribunal for an ACB.

[9] The applicant's claim for a medical and rehabilitation benefit for treatment in China was settled as part of the June 5, 2017 Settlement Agreement and the applicant is precluded from disputing that denial at the Tribunal.

ANALYSIS

Does the Tribunal have jurisdiction to decide the issue of whether the parties agreed to a settlement of a claim or a benefit?

[10] According to the *Insurance Act*[3] the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or of the amount of statutory accident benefits to which an insured person is entitled must be resolved by applying to the Tribunal.

[3] R.S.O 1990, c.I.18. Section 280.

[11] The Financial Services Commission of Ontario ("FSCO") and the Divisional Court[4] has held that arbitrators have the jurisdiction to decide the issue of whether a valid settlement exists.

[12] Although the Tribunal is not bound by FSCO jurisprudence it is my finding that the Tribunal has jurisdiction to resolve the issue of whether a valid settlement exists based on the wording of section 280 of the *Insurance Act* and for the following reasons.

[13] The dispute in the present case is about whether the parties entered into a full and final settlement of the applicant's ACB claim for the past, the present and the future. The issue of ACB is a benefit under the *Schedule* and therefore a potential resolution of the dispute of an ACB by way of a settlement is within the purview of the Tribunal.

[14] In my opinion, in order to resolve a dispute as to whether the parties entered into a valid settlement of a benefit under the *Schedule*, that would require a review of the evidence of the parties' intention in coming to a settlement.

[15] In order to reach a valid settlement, there must be a meeting of the minds in terms of what the parties' intentions were and the settlement must be in compliance with the *Settlement Regulation*[5].

[16] The *Settlement Regulation* is made under the *Insurance Act* which confers jurisdiction to the Tribunal regarding settlement of benefits under the *Schedule*.

[17] The *Settlement Regulation* requires the respondent to take a number of steps such as, but not limited to, providing the applicant with a signed disclosure form that details the amounts that are being paid and for the respondent to notify the applicant that he or she may rescind the settlement within two business days.[6]

The Settlement Agreement

[18] There is no dispute between the parties on whether the respondent complied with the *Settlement Regulation* and although no submissions were provided on this point, the applicant does not appear to have

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[4] *Branchaud and Co-operators General Insurance Company (OIC P96-00048, May 2, 1997) at pages 10 and 11; Haripersaud and State Farm Mutual Automobile Company (FSCO P98-00018, December 17, 1999) and; Wood v. Ontario Insurance Commission, Guardian Insurance Company of Canada and Attorney General of Ontario* [Ontario Divisional Court (O'Driscoll, Durisko and Belch JJ.), dated November 9, 1999, Court File No. 474/98.]

[5] R.R.O. 1990, Regulation 664, section 9.1

[6] Ibid section 9.1 (3).

rescinded the June 5, 2017 Settlement Agreement in accordance with the *Settlement Regulation*.

[19] The issue is whether the June 5, 2017 Settlement Agreement captures what the parties had intended to be resolved. In order to arrive at that conclusion a brief summary is required as to the wording of the June 5, 2017 Settlement Agreement and what the dispute is about with respect to its terms.

[20] The pertinent parts of the June 5, 2017 Settlement Agreement under the heading of Partial Full and Final Release are as follows:

> "In consideration of the payment of ($8,312.37)… I (the applicant) hereby release and forever discharge (the respondent) from any and all actions, applications…have hereafter been entitled to, <u>for Attendant Care Benefits Past Present and Future, and all claims and treatment plans including all treatment costs and expenses arising from said treatment plans for Medical and Rehabilitation Benefits Past and Present</u> (emphasis added) that were submitted prior to and including March 20, 2017 in consequence of the motor vehicle accident occurring on or about May 4, 2014…"

[21] The remainder of the agreement contains the Settlement Disclosure Notice ("SDN") and the wording that is required to be provided to the applicant in accordance with the *Settlement Regulation*.

[22] In order for the agreement to be valid there must have been a meeting of the minds between the parties and not based on a common or mutual mistake as to an essential term of the agreement.

The Law of Mistake

[23] The case of common or mutual mistake is where each party thought it had agreed to something different and accordingly there was no meeting of the minds and no binding agreement, then or at any time thereafter.[7]

[24] I accept the following legal principles as summarized in the FSCO case of Falconer with respect to the law of mistake:

i. An agreement to settle a claim is a contract, and as such the parties must agree on all of the essential or fundamental terms in order for the contract to be valid.

[7] *Falconer v York Fire & Casualty Insurance Co, [2001] OFSCID No. 41. (Falconer)*

ii. The onus is on the party asserting the agreement to satisfy the decision-maker that all essential terms were agreed upon although not yet incorporated into formal documents. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

iii. Where the parties are mistaken about a fundamental term of the contract, a court may find that the agreement is not binding. The reasoning behind this is that there can be no agreement without consent, and there can be no consent where there is a mistake, as for example where the parties communicate at cross purposes, or where an offer is made in one sense and accepted in another. This is because the law requires that an agreement must satisfy standards of certainty as a prerequisite to incurring binding and enforceable contractual relations.

iv. The law, however, distinguishes between mutual mistake, where both parties are honestly mistaken as to the obligations they are undertaking, and unilateral mistake where only one party is mistaken. In the former, neither party may enforce the agreement. If only one party is mistaken, the contract may be enforceable by the other:

> Where one party laboured under a misapprehension as to the intent or terms of the settlement, this would, in the circumstances, constitute a unilateral mistake which cannot, in itself, render the contract void.

v. In order to determine if an agreement has been reached when there has been a mutual mistake, the court applies an objective test, that is, would a reasonable person in the circumstances decide that an agreement had been reached between the parties.

vi. A party may not “snap at” an obviously mistaken offer where the mistake is as to the terms of the offer itself as opposed to the motive or underlying assumptions upon which the offer is premised. In other words, one party may not take advantage of the other’s mistake if he knows, or a reasonable person in his position ought to have known, that the other party was mistaken.

The Position of the Parties

[25] The respondent submits that according to the wording of the June 5, 2017 Settlement Agreement, the ACB was meant to be resolved on a full and final basis which means it includes all future ACB claims. Furthermore, the respondent submits that the SDN, which provides an outline of the

breakdown of the settlement, states, “you have been offered $2,856.40 for all past and future attendant care benefits.” According to the respondent, this is means the ACB was settled on a full and final basis into the future.

[26] The respondent further submits the settlement was confirmed in writing in clear and unequivocal terms as evidenced by the wording of the June 5, 2017 Settlement Agreement and if there was any ambiguity in the SDN then it was resolved by the clear wording of the June 5, 2017 Settlement Agreement.

[27] The applicant submits that the SDN contains multiple mistakes such as the settlement of all past and future non-earner benefit, caregiver benefits, income replacement benefits, rehabilitation and other expenses for $0.00. The applicant submits it was never the parties’ intention to settle the other benefits for $0.00 and it was a mutual mistake on the SDN in that regard.

[28] The applicant further submits that an adverse inference should be drawn against the respondent as it only provided submissions and no affidavit evidence or other evidence to substantiate the parties’ intention.

[29] In my opinion, there is no need to draw an adverse inference in this situation. The parties have provided me with submissions and evidence. The respondent is relying on the wording of the June 5, 2017 Settlement Agreement and the SDN.

[30] The applicant is relying on an affidavit from a paralegal that worked in the office of the representative of the applicant and accompanying exhibits to demonstrate the intention of the parties.

[31] As discussed above, the Tribunal has the jurisdiction to delve into the intention of the parties in arriving at a settlement of a benefit under the *Schedule*.

Was there a meeting of the minds with respect to ACB’s in arriving at the June 5, 2017 Settlement Agreement?

[32] Having reviewed the documentation and submissions of the parties, it is my finding that the parties’ intention was to settle the ACB issue in dispute for a time limited period and not on an ongoing basis or into the future. In my opinion, there was no meeting of the minds in order to form a binding agreement and I arrive at this conclusion based on the following.

[33] As stated above, the *Insurance Act* and the *Settlement Regulation* confers jurisdiction upon the Tribunal to resolve disputes over benefits under the *Schedule*. The June 5, 2017 Settlement Agreement was a resolution between the parties of a disputed benefit. If the terms of that agreement

are in dispute, that would mean a benefit under the *Schedule* is in dispute. The resolution of that dispute would be by the Tribunal and in accordance with the principles of contract law. The Tribunal would make a determination as to whether there was a meeting of the minds with respect to the June 5, 2017 Settlement Agreement.

[34] As stated in paragraph 26, the respondent submits the settlement was confirmed in writing in clear and unequivocal terms as evidenced by the wording of the June 5, 2017 Settlement Agreement. However, the respondent does not provide any evidence other than its submissions as to what was confirmed between the parties and whether it was accurately reflected in the June 5, 2017 Settlement Agreement. Submissions on their own are not evidence and the respondent has not directed me to any evidence of what the parties' intention was and whether that was accurately reflected in the June 5, 2017 Settlement Agreement.

[35] The applicant provided correspondence between the parties in order to confirm what the parties' intentions were.

[36] Both parties agree that documents exchanged shortly after teleconference are more objective and therefore more reliable evidence of what was in the parties' minds than affidavits a year or more after the fact.[8]

[37] With that in mind the applicant submits several email correspondences between the applicant's representative who is also the affiant of the affidavit and between counsel for the respondent.

[38] On May 23, 2017 the applicant's representative wrote to counsel for the respondent stating the following:

> "Please the proposal for resolution for (Tribunal) application (sic), we do not have an instruction to resolve this file at full and final basis, (sic) we have been instructed to resolve the following issues."

[39] The remainder of the email was not provided, however counsel for the respondent responded on May 25, 2017 with the following:

> "In response to your offer, I have instructions to offer the following to settle issues in dispute under LAT File No. 17-001165/AABS…"

[8] *Falconer v York Fire & Casualty Insurance Co, [2001] OFSCID No. 41. (Falconer)*

"Attendant Care:

$1,534.78 for the period between August 1, 2016 to August 18, 2016…"

"The total amount is $6,990.75. This would settle issues 2, 3, 4, 5, 6, 7 and 9 of the applicable (Tribunal) application…

…all treatment plans (emphasis in original) in dispute that were submitted prior to and up to March 20, 2017 have been settled and will not be pursued."

[40] On May 25, 2017 at 1:04 pm the respondent's counsel confirmed a telephone conversation with the applicant's representative and stated the following:

"It was a pleasure speaking to you today. I confirm that we have settled issue 2 through 7 and 9 for (Tribunal) file No. 17-001165/AABS…

As per the terms of our settlement, (the respondent) will pay $8,311.37 to satisfy all claimed medical benefits and rehabilitation up to and including March 20, 2017, **the attendant care issue in dispute (as per issue 2)**…(emphasis added)"

[41] A review of issue 2 of the Tribunal application filed by the applicant dated February 27, 2017 lists issue 2 as an Attendant Care Benefit in the amount of $2,643.24 for the time period in dispute being between May 16, 2016 to July 31, 2016. The applicant also attached a schedule to the Tribunal Application which provided a further breakdown of the benefits in dispute.[9] In that schedule the ACB issue is detailed and it lists again the time period of the ACB dispute for a specific period.

[42] In my opinion, after a review of the correspondence and submissions of the parties a reasonable person in the circumstances could not conclude a valid settlement was reached for the ACB. The June 5, 2017 Settlement Agreement did not capture the parties' intention with respect to the ACB as there was no intention to settle ACB into the future. I find it more likely, on a balance of probabilities that the parties' intention was to settle the ACB's on a time specific basis as discussed above and as a result, it was a mutual mistake and no meeting of the minds in order to be considered valid and therefore neither party may enforce the June 5, 2017 Settlement Agreement with respect to ACB's.

[9] Submissions of the Respondent at page 21.

Validity of the settlement of the medical benefit for treatment in China

[43] It is my finding and on a balance of probabilities that the medical benefit seeking treatment in China was contemplated to be settled and was covered under the June 5, 2017 Settlement Agreement for the following reasons.

[44] The Settlement Agreement stated the following with respect to medical benefits:

> "all claims and treatment plans including all treatment costs and expenses arising from said treatment plans for Medical and Rehabilitation Benefits Past and Present (emphasis added) that were submitted prior to and including March 20, 2017 in consequence of the motor vehicle accident occurring on or about May 4, 2014…"

[45] The treatment plan in dispute for $3,844.66 was submitted to the respondent on March 3, 2016 and denied on March 7, 2017. The email communication from counsel for the respondent on May 25, 2017 stated the following:

> "As per the terms of the settlement, (the respondent) will pay $8,312.37 to satisfy all claimed medical benefits and rehabilitation up to and including March 20, 2017…"

[46] In my opinion, based on the email communication, the June 5, 2017 Settlement Agreement accurately depicts the parties' intention to settle all prior and present medical and rehabilitation benefits up to and including March 20, 2017. That would encompass the treatment plan submitted in March 2016 and denied by the respondent on March 7, 2017.

[47] As a result, the applicant is precluded from disputing the denial of the medical benefit in the amount of $3,844.66 for treatment in China as it was part of the June 5, 2017 Settlement Agreement.

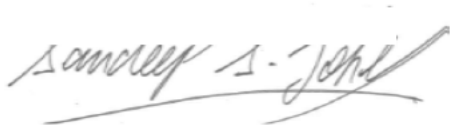
CONCLUSION AND ORDER

[48] As a result of the above and my finding that the parties were both under a mutual mistake and did not have a meeting of the minds with respect to the applicant's claim for an ACB, the settlement funds with respect to the ACB shall be returned to the respondent before the applicant is entitled to dispute the benefit at the Tribunal.[10]

[10] Supra Note 5 section 9.1(8)

[49] The June 5, 2017 Settlement Agreement remains valid with respect to the applicant's claim for medical and rehabilitation benefits for treatment in China and the applicant is precluded from disputing that denial at the Tribunal.

Released: August 22, 2019



Sandeep Johal
Adjudicator