



Citation: Pettemerides v. Security National Insurance Company 2024 ONLAT 24-000673/AABS-PI

Licence Appeal Tribunal File Number: 24-000673/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:

Petros Pettemerides

Applicant

and

Security National Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: Ulana Pahuta

APPEARANCES:

For the Applicant: Rakesh Sharma, Counsel

For the Respondent: Wendy Breuer, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Petros Pettemerides, the applicant, was involved in an automobile accident on November 9, 2022 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (the “Schedule”)*. The applicant was denied certain benefits by the respondent, Security National Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

- [2] The preliminary issue to be decided at this hearing is:
- i. Is the applicant barred under s. 61 of the *Schedule* from pursuing their claim for accident benefits at the Tribunal due to alleged entitlement to benefits under the *Workplace Safety and Insurance Act, 1997*?

RESULT

- [3] I find that the applicant is not statute-barred under s. 61 of the *Schedule* and may proceed with his application for accident benefits before the Tribunal.

PROCEDURAL ISSUE

- [4] In his submissions for this preliminary issue hearing, the applicant raises the issue of the respondent’s improper submission of an Affidavit executed by Anne Padhani. He argues that the Case Conference Report and Order dated June 28, 2024 (“CCRO”) explicitly stated that the parties agreed that no affidavits would be submitted. The applicant requests that paragraphs 10 to 28 and 39 of the respondent’s submissions referencing the Affidavit and the Affidavit exhibits, be excluded and not relied on at this written hearing. The respondent did not file reply submissions.
- [5] The applicant’s request to exclude Ms. Padhani’s Affidavit and its exhibits, is denied.
- [6] From my review of Ms. Padhani’s Affidavit, it is limited to providing a chronology of events through documents identified in, and attached as exhibits to the Affidavit. The exhibits include such highly relevant documents as the applicant’s signed telephone statement to the respondent, his Application for Accident Benefits, the transcript of his Examination Under Oath and his Employer’s Confirmation Form. These documents seem to be essential for establishing an evidentiary and factual basis for a claim. The respondent did not file a document

brief, or include any exhibits to its preliminary issue hearing submissions. Rather, all of its evidence was included as exhibits to the Affidavit. From my review of the respondent's materials, it appears that the respondent mistakenly attempted to introduce all of its evidence by way of affidavit rather than by exhibits to its preliminary issue hearing submissions or by way of a separate document brief.

- [7] While I agree with the applicant that the CCRO stated that affidavit evidence would not be included, the applicant has not provided any submissions or evidence as to the prejudice he would suffer by the inclusion of the Affidavit. However, I find that excluding the Affidavit would be severely prejudicial to the respondent. It would effectively strike the entirety of the respondent's evidence for this hearing. As such, the applicant's request to exclude the Affidavit of Ms. Padhani and its exhibits is denied. However, I have given no weight to the portions of the Affidavit that express opinions or make submissions regarding the attached documents, but rather, I have considered only the facts established by the documents themselves.

BACKGROUND

- [8] The applicant was involved in a single vehicle accident on November 9, 2022, when the vehicle he was driving, with his wife as passenger, hit a bird on Highway 407. The applicant filed an Application for Accident Benefits ("OCF-1") with the respondent dated November 18, 2022.
- [9] The respondent initially paid the applicant accident benefits, including an income replacement benefit. After conducting insurer's examinations ("IE"), in August 2023 the respondent denied the applicant's IRB claim and treatment plan, based on the IE assessors' findings. The applicant filed an application with the Tribunal on January 17, 2024 disputing the denials.
- [10] The respondent subsequently wrote to the applicant on February 28, 2024, stating that a review of the applicant's claim indicated that he may be eligible for benefits under the *Workplace Safety and Insurance Act, 1997* ("WSIA"). It informed the applicant that pursuant to s. 61 of the *Schedule* no benefits are payable if the insured person is entitled to receive benefits under the *WSIA* and the applicant was advised to make a claim for benefits to the Workplace Safety and Insurance Board (WSIB). The applicant has not made a claim for benefits to the WSIB.

ANALYSIS

Law - Section 61

- [11] Section 61(1) of the *Schedule* states that insurers are not required to pay accident benefits under the *Schedule* to those who are entitled to claim workers' compensation benefits under the *WSIA*. The exact wording of the section is important and forms the basis of the dispute:

61. (1) The insurer is not required to pay benefits described in this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under the *Workplace Safety and Insurance Act*, 1997 or any other workers' compensation law or plan.

- [12] Section 61(2) provides a limited exception to the general rule in s. 61(1). That exception applies to injured workers who elect to seek damages in tort for their injuries, in which case they may also claim benefits under the *Schedule* provided that their election was not made primarily for the purpose of claiming accident benefits.

The parties' positions

- [13] The respondent submits that the applicant was in the course of his employment when the accident occurred, and as such, is entitled to WSIB benefits and is precluded from claiming accident benefits pursuant to s. 61(1) of the *Schedule*. The applicant worked for his wife's construction company when the accident occurred and was driving a pick up truck insured by his wife. The respondent relies on the applicant's signed Statement to TD Insurance given on January 31, 2023, where the applicant stated that the accident occurred when he and his wife were returning home after visiting a job site.
- [14] In his January 31, 2023 Statement, the applicant said that "(a)fter visiting the job site, we were on our way back home. I was driving eastbound on the 407 a large bird tried to land in my lane ahead of my vehicle but I couldn't swerve..."
- [15] The respondent cites a Workplace Safety and Insurance Appeal Tribunal ("WSIAT") Decision No. 993/21 2021 ONWSIAT 1616 (CanLII), which considered the case of a personal support worker ("PSW"). The WSIAT found that travelling is considered to be in the course of employment when the worker is required to travel away from the employer's premises to perform the employer's business. It further found that it was irrelevant whether the claimant was travelling between PSW clients or on her way home from her last client. The

respondent argues the reasoning in this case is applicable, since in the present matter the applicant similarly travelled between job sites during the course of his day. As such, the respondent argues that the applicant's drive home from a job site should be considered "in the course of his employment".

- [16] The respondent also raises additional arguments that the applicant was non-compliant with s. 33 requests for a copy of the WSIB application and the Assignment of Benefits form, and that he has failed to discharge his onus to prove that he has not claimed WSIB. It cites Tribunal decisions *17-004564 v Aviva Insurance Canada*, 2018 CanLII 97833 (ON LAT), and *Windsor v Aviva Insurance Company*, 2020 CanLII 123145 (ON LAT) in support of its position.
- [17] The applicant submits that the respondent has failed to establish that the accident occurred in the course of his employment. He relies on his OCF-1 form dated November 18, 2022, where he confirmed that the accident did not occur when he was at work. The applicant further cites the WSIB Operational Policy Manual – Accident in the Course of Employment, where the criteria used to determine whether an accident occurred in the course of employment are noted to be the circumstances relating to place, time and activity. The applicant argues that the respondent has not provided valid reasons as to why the accident should be considered to have taken place during the course of his employment when considering these criteria.
- [18] The applicant also raises the alternative arguments that the process to address the preliminary issue lacks procedural fairness and that the respondent is estopped from raising the applicability of s. 61 since it continued to adjust his claim for a period of 18 months after the accident. Finally, the applicant argues that before claiming a preliminary issue, s. 54 of the *Schedule* requires an insurer to first prove that it provided written notice of a refusal to pay a benefit as a result of the application of s. 61. Since the respondent's notices did not reference s. 61 as the reason for the denial, the applicant argues that there is no preliminary issue that the respondent can now raise.

Did the accident take place while the applicant was in the course of his employment?

- [19] I find that the respondent has not met its burden to prove that the accident occurred while the applicant was in the course of his employment.
- [20] To establish its claim, the respondent relies solely on the applicant's signed January 31, 2023 telephone statement to TD Insurance. I agree with the respondent that in this signed statement, the applicant said that the accident

happened when he was returning home “after visiting the job site”. However, there is additional evidence that contradicts this statement.

- [21] In his Examination Under Oath dated April 29, 2024 (“EUO”) the applicant stated a number of times that the accident occurred when he and his wife were driving back home after a visit to a friend’s house. Under questioning the applicant provided the name of the friend, a doctor and former client. The applicant clarified the route he took from the friend’s house to Highway 407, citing specific roads. Although the applicant stated that his wife’s company had previously done renovations for their friend, the applicant said that the work had finished in February 2022. When questioned further the applicant again stated that she was “just a friend” and when asked whether work was being done at her house, the applicant said “no”. He further agreed that it was just a social visit.
- [22] The respondent argues that the signed January 31, 2023 telephone statement should be preferred to the applicant’s testimony at the EUO, since the telephone statement was more contemporaneous with the accident than the EUO. However, while I agree with the respondent that the signed statement is closer in time to the accident, the testimony at the EUO was provided under oath and contains much more detail than the telephone statement. At the EUO the applicant was asked a number of times to clarify the circumstances of the accident and each time he was consistent in stating that he was returning home from a visit with a friend. In contrast, the signed telephone statement did not provide any specific details about where the applicant was driving from other than to state that it was “after visiting the job site” in Milton.
- [23] Moreover, despite arguing that the applicant’s telephone statement is more accurate and reliable than the testimony in the EUO given its earlier date, in its submissions the respondent still relies on a number of the applicant’s statements at the EUO. The respondent references various statements the applicant made relating to his employment circumstances, when establishing the details of the applicant’s employment. As such, the respondent appears to have accepted a portion the applicant’s EUO questioning to be accurate and reliable. Finally if I were to consider the most contemporaneous evidence in relation to the accident, I agree with the applicant that in the OCF-1 he stated that the accident did not occur when he was at work.
- [24] The burden of proof rests with the respondent to establish on a balance of probabilities that the accident took place in the course of the applicant’s employment. I do not find that the respondent has met its burden in this regard. Given that the respondent has not established that the applicant was in the

course of his employment when the accident occurred, I find that the applicant is not precluded from claiming accident benefits pursuant to s. 61(1) of the *Schedule*.

Respondent's arguments relating to s. 33 non-compliance and the applicant's failure to prove that he has not claimed WSIB

- [25] I further am not persuaded by the respondent's additional arguments that the applicant was non-compliant with s. 33 requests for a copy of the WSIB application and the Assignment of Benefits form, and that the applicant has failed to discharge his onus to prove that he has not claimed WSIB.
- [26] I do not find that these arguments are relevant to the preliminary issue of whether the applicant is barred from pursuing his claim for accident benefits because he is entitled to claim benefits under the *WSIA*. Although the respondent cites Tribunal decisions *17-004564 v Aviva Insurance Canada*, 2018 CanLII 97833 (ON LAT), and *Windsor v Aviva Insurance Company*, 2020 CanLII 123145 (ON LAT) in support of these arguments, I note that these decisions dealt with substantive issues in dispute not the preliminary issue being considered at this hearing.

Costs

- [27] In his submissions, the applicant sought costs in the amount of \$5,000 pursuant to Rule 19.1 of the Licence Appeal Tribunal Rules and the Unfair or Deceptive Acts or Practices Rules. I do not find that the respondent's conduct amounts to behaviour warranting costs in a preliminary hearing setting. I find that the respondent raised a valid preliminary issue and that it was permitted to question whether the accident occurred during the course of the applicant's employment. I find no basis to award costs at this preliminary stage.

ORDER

- [28] I find that the applicant is not statute-barred under s. 61 of the *Schedule* from proceeding with his application for accident benefits at the Tribunal. The matter will proceed to the hearing of the substantive issues.

Released: November 8, 2024



**Ulana Pahuta
Adjudicator**