2018 CarswellOnt 1615
Financial Services Commission of Ontario (Appeal Decision)

Kashefi and TD Home and Auto Insurance Co., Re

2018 CarswellOnt 1615

FARZANEH KASHEFI (Appellant) and TD HOME AND AUTO INSURANCE COMPANY (Respondent)

Edward Lee Dir. Delegate

Heard: December 6, 2017
Judgment: January 23, 2018
Docket: P16-00036

Proceedings: reversing *Kashefi v. TD Home and Auto Insurance Co.* (2016), 2016 CarswellOnt 5681, Marcel D. Mongeon Member (F.S.C.O. Arb.)

Counsel: Alex Nikolaev, for Ms Kashefi
Tricia McAvoy, for TD Home and Auto Insurance

Subject: Insurance

Headnote

Insurance --- Automobile insurance — No-fault benefits — Other benefits — Non-earner benefits
Insurance --- Automobile insurance — No-fault benefits — Other benefits — Miscellaneous

Table of Authorities

Cases considered by *Edward Lee Dir. Delegate*:

Cejvan v. Western Assurance Co. (2014), 2014 CarswellOnt 18227 (F.S.C.O. App.) — referred to
N. (T.) v. Personal Insurance Co. of Canada (2012), 2012 CarswellOnt 10008 (F.S.C.O. Arb.) — referred to
Sagan v. Dominion of Canada General Insurance Co. (2014), 2014 ONCA 720, 2014 CarswellOnt 14448, 123 O.R. (3d) 314, 41 C.C.L.I. (5th) 22 (Ont. C.A.) — considered
Sietzema v. Economical Insurance (2014), 2014 ONCA 111, 2014 CarswellOnt 1495, (sub nom. *Sietzema v. Economical Mutual Insurance Co.*) 118 O.R. (3d) 713, (sub nom. *Sietzema v. Economical Mutual Insurance Co.*) 315 O.A.C. 392, 32 C.C.L.I. (5th) 1 (Ont. C.A.) — referred to

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8
s. 283 [rep. & sub. 2014, c. 9, Sched. 3, s. 14] — referred to

s. 283(1) — referred to
Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
s. 7(2) — considered

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8
Automobile Insurance, R.R.O. 1990, Reg. 664

Generally — referred to

Statutory Accident Benefits Schedule — Effective September 1, 2010, O. Reg. 34/10

Generally — referred to

s. 12(1) — considered

s. 12(1) ¶ 1 — referred to

s. 19 — considered

s. 19(1) — considered

s. 19(1)(a) — referred to

s. 19(2) — considered

s. 32 — considered

s. 32(1) — considered

s. 32(5) — considered

s. 36(1) "specified benefit" — referred to

s. 36(2) — considered

s. 36(3) — considered

s. 42 — considered

s. 42(1)(a) — referred to

s. 42(5) — considered

s. 55 — referred to

***Edward Lee Dir. Delegate*:**

1 Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, *2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the decision is granted and the Arbitrator's order is rescinded. The claims for the non-earner benefit and the attendant care benefit are not dismissed by section 55 of the *SABS*. The matter may proceed to a hearing on the merits before a different arbitrator.

2. If the parties are unable to agree on the legal expenses of this appeal, an expense hearing may be requested in accordance with the *Dispute Resolution Practice Code*.

***Edward Lee Dir. Delegate*:**

I. NATURE OF THE APPEAL

2 This matter involves the *SABS-2010*. [1]

3 Ms. Farzaneh Kashefi ("the Appellant") appeals the Arbitrator's order of March 18, 2016. The Appellant submits that the Arbitrator erred in law on two grounds. First, he erred when he conducted the hearing (which was to have been determined by written submissions) without hearing or reading any submissions from the Appellant. Second, he erred in

law when he determined that she had never made valid claims for the non-earner or attendant care benefits. As a result, the arbitrator went on to dismiss those claims pursuant to section 55 of the *SABS*.

4 For reasons that follow, I conclude that the Arbitrator did not err in law by proceeding to conduct the hearing without the written submissions of Ms. Kashefi. On the other hand, I find the Arbitrator did err in law when he determined that the Appellant had not made valid claims for the non-earner or attendant care benefits. He also erred when he went on to dismiss those claims pursuant to section 55 of the *SABS*.

II. BACKGROUND

5 Ms. Kashefi was injured in an automobile accident on December 3, 2010 and claimed accident benefits from TD Home and Auto Insurance Company ("TD"). Disputes arose in regard to those benefits and the Appellant applied for arbitration at the Financial Services Commission of Ontario.

6 A preliminary issue was raised by TD: Should Ms. Kashefi's claims for the non-earner benefit and the attendant care benefit be dismissed because of section 55 of the *SABS*?

7 It was agreed this preliminary issue would be determined through written submissions. A time table for submissions was established, and after the insurer filed their submissions, the Appellant's former counsel brought a motion to be removed from the record as her legal representative. The motion was heard and the former counsel was removed from the record. The Appellant was then given an extension of approximately five months to file her written submissions.

8 Several days before the deadline, the Appellant's brother sent an email requesting "extended time." This time, the Arbitrator refused the request, but communicated that he would delay his consideration of the matter for another twelve days after the expiry of the deadline.

9 No submissions were ever received from the Appellant. At the preliminary issue hearing, the Arbitrator proceeded in the absence of any participation from the Appellant.

10 He considered the three Disability Certificates (OCF-3s) that had been filed with the Appellant's application for accident benefits. The Arbitrator ruled that two of the OCF-3s did not suggest an entitlement to the non-earner benefit. Accordingly, no claim could have been made by the Appellant for this benefit. The third OCF-3 did suggest an entitlement to the non-earner benefit, but even so, the Arbitrator concluded the Appellant was unable to prove her disability had been "continuous since the time of the accident, as required by section 3(7)(a) of the Schedule."

11 In regard to the Attendant Care benefit, the Arbitrator determined that no Form 1 had ever been filed. Because of the lack of a Form 1, he ruled there had never been a valid application for this benefit. Accordingly, this claim was also dismissed pursuant to section 55 of the *Schedule*.

12 The Appellant appeals the Arbitrator's decision on two major grounds: the denial of natural justice and procedural fairness, and an error in law in the interpretation of section 55 of the *SABS*.

III. ANALYSIS

(a) Was there a denial of natural justice and procedural fairness because the Arbitrator proceeded to dismiss the Appellant's claims for the non-earner and attendant care benefits without hearing or reading any submissions whatsoever from the Appellant?

13 In his decision, the Arbitrator determined the Appellant had received notice of the preliminary issue hearing, and also had received notice that if no submissions were received, her non-earner and attendant care claims might be dismissed. He did not grant her a second extension of time or an adjournment to file her submissions. Instead, he proceeded in the absence of written submissions from the Appellant.

14 I find the Arbitrator could base his decision to proceed on section 7(2) of the *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22 which provides as follows:

> **7(2)** Where notice of a written hearing has been given to a party to a proceeding in accordance with this *Act* and the party neither acts under clause 6 (4) (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding [emphasis mine].

15 In addition, the *Dispute Resolution Practice Code* also addresses non-participation:

> 37.9 Where notice of hearing has been sent to a party and a party does not attend at an oral or electronic hearing, or participate in a written hearing, the arbitrator may proceed with the hearing in the party's absence or without the party's participation, as the case may be, and the party is not entitled to any further notice in the proceeding. [emphasis mine]

16 In the present case, the Arbitrator was satisfied that the Appellant had notice of both the hearing and the possibility that her claim might be dismissed should she not provide written submissions. I find no error of law or denial of natural justice or procedural fairness in his conducting the hearing in absence of written submissions from the Appellant.

17 Finally, in regard to the granting of a second extension of time to the Appellant, adjournments are addressed at Rule 72 of the *Dispute Resolution Practice Code*.

> 72.3 In deciding whether an adjournment is appropriate, the adjudicator shall refer to the Adjournments Policy found in Practice Note 9 under Section C of the *Code*.

18 Although not binding on the arbitrator, such practice notes are designed to be a guide for users of the dispute resolution process.

19 An arbitrator's power to grant an adjournment is discretionary. In the present case, the Appellant had already been granted an extra five months to file her written submissions. None of the considerations mentioned in the Adjournment Policy and Practice Note were present. And even though the Arbitrator refused the extension request, he nonetheless allowed the Appellant an additional twelve days to file her submissions.

20 Although the Appellant argued that the Arbitrator should have considered language and cognitive issues in his consideration of the adjournment request, it is clear from the Arbitrator's decision [2] that an interpreter was available to the Appellant at the motion to withdraw from the proceeding.

21 In regard to cognitive issues, nothing in the decision suggests that this issue was raised before the Arbitrator. Appeals from arbitrators' decisions are limited to questions of law. [3] A party may not adduce new evidence or raise new arguments at appeal.

22 I find the Arbitrator exercised his discretionary reasonably and appropriately. I do not find any error of law or any denial of natural justice or procedural fairness in his decision to refuse the Appellant a further extension of time and to proceed with the hearing in the absence of her written submissions.

(b) Did the Arbitrator err in law in interpreting section 55 of the SABS to mean that valid claims for Non-earner benefits require every OCF-3 to confirm that the non-earner benefit test was met?

23 The Arbitrator reviewed two Disability Certificates ("OCF-3s") that had been submitted by the Appellant. He noted that Part 6 of both those OCF-3s, relating to a complete inability to carry on a normal life ("the test for non-earner benefits"), was answered in the negative. The Arbitrator ruled as follows:

> Neither of the two OCF-3 forms suggest an entitlement to non-earner benefits; how can it be said that a claim for such benefits has even been made by the Applicant? If no such claim has ever been made, how can there be a mediation or, subsequently, an Arbitration? [at page 5]

24 The Arbitrator took notice of a third OCF-3, which *did* indicate that the Appellant had suffered a complete inability to carry on a normal life, but nonetheless, he made this ruling:

> ... even if this were so, the Applicant would not be able to show that her disability had been continuous from the time of the accident, as required by section 3(7)(a) of the *Schedule* — the Applicant's first two OCF-3s would be evidence to disprove the continuous nature of a disability. [at page 5]

25 He then directed himself to what he considered the relevant portion of section 55 of the *SABS* and dismissed the claim for the non-earner benefit.

> 55: An insured person shall not commence a mediation proceeding under section 280 of the *Act* if any of the following circumstances exist;
>
> The insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or *has not submitted an application for the benefit* within the time frames prescribed by this regulation ..." [emphasis mine]

26 I find the Arbitrator erred in law when he required the OCF-3s to confirm that the Appellant was entitled to the non-earner benefit.

27 The applicable provisions relating to the application for the non-earner benefit are found at sections 32 and following of the *SABS*.

28 Sections 32(1) and 32(5) state that a person who intends to apply for an accident benefit shall submit a completed and signed Application for Accident Benefits. Section 36(2) requires an applicant who is claiming a non-earner benefit to submit a completed and signed Disability Certificate (OCF-3) with his Application for Accident Benefits.

29 In the present case, the Arbitrator erred in law by considering whether the accompanying OCF-3s suggested entitlement to the non-earner benefit. Nothing in the legislation or jurisprudence requires the OCF-3s to suggest entitlement to the benefit. Even the failure to submit an OCF-3 does not invalidate a claim for the non-earner benefit. According to section 36(3), it only disentitles the applicant to the benefit during the period in which the applicant was in default.

30 In addition, the Arbitrator committed another error of law by ruling that the third OCF-3 (which *did* suggest entitlement) could not amount to a valid claim because the Appellant "... would not be able to show her disability had been continuous from the time of the accident, as required by section 3(7)(a) of the *Schedule* — " [4]

31 The Arbitrator did not have to decide if the claim was continuous; he only had to decide if a claim for non-earner benefits had been made. Further, he was also wrong in ruling that the disability had to be "continuous from the time of the accident." Section 12(1) of the *SABS* only requires an insured person to suffer "... a complete inability as a result of and *within 104 weeks* after the accident." [Emphasis mine]

32 Finally, the Arbitrator also erred in law by ignoring or not recognizing that the Appellant's "Application for Accident Benefits" (OCF-1) [5] constituted a valid claim for the benefits in question. The Appellant, at Part 6 of the OCF-1, had checked the box for "Unemployed" to describe her employment status at the time of the accident.

33 The case law has consistently held that the OCF-1 is itself the application "... for all weekly benefits. [6] " These cases recognize that insurers may now validly consider, accept or reject weekly benefits based on an OCF-1 received.

34 In addition, the Court of Appeal ruled in *Sagan v. Dominion of Canada General Insurance Co.* [7] that an Application for Accident Benefits (OCF-1) alone is sufficient to start the two-year limitation period even when no Disability Certificate (OCF-3) accompanies the OCF-1.

> A plain reading of section 35(2) provides that the disability certificate is to be filed *with* the application for benefits. It is not *the* application. In addition, section 35(6) provides for claims to be considered in cases where there is no disability certificate filed at all. (page 3)

35 Therefore, the Arbitrator erred in law when he determined that no valid claim for the non-earner benefit had been made. It was not necessary for him to consider the OCF-3s. The claim for the non-earner benefit was in the OCF-1 itself. He also erred in law by dismissing the claim based on section 55 of the *SABS*.

(c) Did the Arbitrator err in law in interpreting section 19 of the SABS and concluding that no claim for Attendant Care Benefits can be made without filing a timely Form 1?

36 The Appellant, at Part 7 of her Application for Accident Benefits (OCF-1), checked "Yes" in answer to the question: "Were you the main caregiver to people living with you at the time of the accident?" She also provided the name and date of birth for this person.

37 Despite this information, the Arbitrator ruled as follows:

> No Form 1 had ever been filed. Therefore no valid application for an attendant care benefit has ever been made. [8]

38 The Arbitrator then dismissed this claim by section 55 of the *SABS*. I find this was an error of law.

39 The provisions regarding Attendant Care Benefits are found at section 19 and following of the *SABS*.

40 Section 19(1) states that Attendant Care benefits shall pay for all reasonable and necessary expenses.

41 Section 19(2) states that the *amount* of the monthly attendant care benefit is to be determined in accordance with a document entitled the "Assessment of Attendant Care Needs" or the Form 1.

42 Section 42 states that a claim for Attendant Care must be in the form of, and contain the information required to be provided in the "Assessment of Attendant Care Needs" that is approved by the Superintendent.

43 Nevertheless, nothing in the legislation or jurisprudence [9] suggests that an application for the attendant care benefit is *invalidated* by the lack of a Form 1. In fact, section 42(5) of the *SABS* explicitly states that an insurer may commence paying an attendant care benefit even *before* it receives the Assessment of Attendant Care Needs.

44 Therefore I find the Arbitrator erred in law when he concluded that no valid claim for Attendant Care benefits had been made by the Appellant because no Form 1 had been filed. He also erred in law by applying section 55 of the *SABS* to dismiss the attendant care claim.

IV. EXPENSES

45 If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Appendix

Notice to insurer and application for benefits

32. (1) A person who intends to apply for one or more benefits described in this Regulation shall notify the insurer of his or her intention no later than the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable after that day. O. Reg. 34/10, s. 32 (1).

. . .

(5) The applicant shall submit a completed and signed application for benefits to the insurer within 30 days after receiving the application forms. O. Reg. 34/10, s. 32 (5).

Application

36. (1) In this section and section 37,

> "specified benefit" means an income replacement benefit, non-earner benefit, caregiver benefit or a payment for housekeeping or home maintenance services under section 23. O. Reg. 34/10, s. 36 (1).

(2) An applicant for a specified benefit shall submit a completed disability certificate with his or her application under section 32. O. Reg. 34/10, s. 36 (2).

(3) An applicant who fails to submit a completed disability certificate is not entitled to a specified benefit for any period before the completed disability certificate is submitted. O. Reg. 34/10, s. 36 (3).

Attendant care benefit

19. (1) Attendant care benefits shall pay for all reasonable and necessary expenses,

> (a) that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant or by a long-term care facility, including a long-term care home under the Long-Term Care Homes Act, 2007 or a chronic care hospital; and

. . .

(2) Subject to subsection (3), the amount of a monthly attendant care benefit is determined in accordance with the version of the document entitled "Assessment of Attendant Care Needs" that is required to be submitted under section 42 and is calculated by,

. . .

Application for attendant care benefits

42. (1) Subject to subsection (2), an application for attendant care benefits for an insured person must be,

> (a) in the form of and contain the information required to be provided in the version of the document entitled "Assessment of Attendant Care Needs" that is approved by the Superintendent for use in connection with the claim; and

. . .

(5) An insurer may, but is not required to, pay an expense incurred before an assessment of attendant needs that complies with this section is submitted to the insurer. O. Reg. 34/10, s. 42 (5).

Non-earner benefit

12. (1) The insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies any of the following conditions:

1. The insured person suffers a complete inability to carry on a normal life *as a result of and within 104 weeks* after the accident and does not qualify for an income replacement benefit.

The Adjournment Policy in Practice Note 9

FSCO has an obligation to conduct arbitrations efficiently and speedily. Parties are contacted and agree to pre-hearing and hearing dates well in advance of the dates set. Therefore, adjournments are granted only sparingly once dates have been set.

WHEN WILL ADJOURNMENTS BE GRANTED?

Requests for adjournments will only be considered in three circumstances:

• in cases of personal emergencies, such as serious illnesses or deaths in the family

• for valid reasons relating to the hearing itself, such as an imminent settlement, or medical or other critical evidence that is UNAVOIDABLY delayed

• when a lawyer is involved in a trial or other proceeding that was scheduled to conclude before the start of FSCO proceeding and which has continued or been held over into the time scheduled for FSCO proceeding.

Footnotes

1 *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

2 Decision of Arbitrator Schnapp of March 18, 2016

3 Section 283(1) *Insurance Act*

4 Page 5 of the decision

5 This document had been filed before the Arbitrator at Tab C of TD's material.

6 *Cejvan v. Western Assurance Co.* [2014 CarswellOnt 18227 (F.S.C.O. App.)] (FSCO P14-00007, December 4, 2014), and *Sietzema v. Economical Insurance*, 2014 ONCA 111 (Ont. C.A.)

7 2014 ONCA 720 (Ont. C.A.)

8 At page 6 of his decision

9 *N. (T.) v. Personal Insurance Co. of Canada* [2012 CarswellOnt 10008 (F.S.C.O. Arb.)] (FSCO A06-000399, July 26, 2012), at page 19

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