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

Citation: Jama vs. Unifund, 2021 ONLAT 20-005328/AABS

Released date: January 28, 2021
Tribunal File Number: 20-005328/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act,* R.S.O. 1990, c. I.8., in relation to statutory accident benefits

Between:

Hadsan Jama

Applicant

and

Unifund

Respondent

MOTION DECISION

Adjudicator:	**Craig Mazerolle, Member**
Decision Dated:	**January 28, 2021**

BACKGROUND

[1] This proceeding, under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*")[1], arises out of a motor vehicle accident on June 11, 2018.

[2] The substantive issues in dispute include requests for an income replacement benefit, several medical benefits and an award. These issues will be addressed by way of a substantive issues hearing scheduled for April 6 – 9, 2021.

[3] During a case conference held on October 1, 2020, the parties identified the following preliminary issue: "Whether any income replacement benefits are payable to the applicant, pursuant to s. 57 of the *Schedule*?"

[4] The parties agreed to have this preliminary issue decided by way of a motion hearing. As such, the respondent filed a Notice of Motion (dated October 5, 2020) seeking the following relief:

i. An order finding that the applicant is not entitled to receive an income replacement benefit, pursuant to s. 57 of the *Schedule*; and

ii. An order for costs from the applicant.

[5] In response, the applicant opposed the requested relief. She also asked for costs against the respondent.

[6] For the following reasons, I find that the respondent did not provide proper notice of its intention to cease payment of the applicant's income replacement benefit under s. 57 of the *Schedule*.

PARTIES' POSITIONS

[7] The respondent submitted that, even though it instructed the applicant to participate in a work hardening program, the applicant failed to comply with this recommended treatment. Specifically, in a report from one of the respondent's assessors that found she met the "substantial inability" standard for an income replacement benefit, Dr. Ian Harrington concluded that the applicant's prognosis was "good", provided she participated in treatment focused on "strengthening exercises" (report dated December 14, 2018).

[8] Therefore, in a follow up letter to this report, the respondent instructed the applicant to work with her family physician to pursue this treatment (letter dated May 24, 2019). When the applicant failed to comply, the respondent ceased payment of her income replacement benefit on June 25, 2019 (letter dated June 20, 2019).

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[1] O. Reg. 34/10.

[9] To support its position, the respondent then highlighted a treatment plan that the applicant submitted for a work conditioning program (dated November 21, 2019 and approved on December 3, 2019). According to the respondent, this treatment plan has yet to be incurred, yet the health practitioner who prepared the plan specifically mentioned Dr. Harrington's report as the inspiration for the plan.

[10] Finally, the respondent submitted that a later worksite assessment report (dated September 28, 2020) supported the recommendation for the applicant's participation in a rehabilitation program.

[11] The applicant responded by first alleging that the respondent did not comply with the notice provision in s. 57. That is, in none of the correspondence sent from the respondent following receipt of Dr. Harrington's report was there any indication of what treatment the applicant had to pursue to be in compliance with s. 57(2). Additionally, none of the correspondence sent before the June 20, 2019 Explanation of Benefits explained that the income replacement benefit could be cut off due to non-compliance with s. 57(2)—a lack of information that is troubling considering the applicant's limited English.

[12] The applicant also took issue with the limited amount of time she was given to comply with the instructions provided in the May 24, 2019 letter, as the respondent ceased paying her income replacement benefit about a month later.

[13] Finally, the applicant contended that the respondent has not cited all of the recommendations from Dr. Harrington, and it is instead picking and choosing what to base its denial on. For instance, though there is no indication in Dr. Harrington's report that a worksite assessment was necessary, the respondent informed the applicant that no income replacement benefit would be paid until one was complete.

[14] In reply, the respondent added that it did not act hastily in stopping the applicant's income replacement benefit, and the May 24, 2019 letter included an offer to assist the applicant with any questions she might have. The respondent also noted that Dr. Harrington did, in fact, state that a worksite assessment was needed, and the applicant's income replacement benefit has not been restarted because she has yet to participate in the conditioning program it approved.

ANALYSIS

[15] Section 57(2) of the *Schedule* outlines an insured person's responsibility to pursue reasonable, necessary, and available forms of treatment if he or she seeks to continue receiving a weekly benefit, such as an income replacement benefit:

> An insured person who is entitled to an income replacement, non-earner or caregiver benefit shall obtain such treatment and

participate in such rehabilitation as is reasonable, available and necessary to,

(a) permit the insured person to engage in employment or self-employment in accordance with the criteria set out in subsection (3), in the case of an insured person entitled to an income replacement benefit; or

(b) shorten the period during which the benefit is payable, in any other case.

[16] The penalty for failing to comply with this requirement is enumerated in subsections (4) and (5). These sections also provide details about the notice that an insurer must first send an insured person before it can engage this penalty:

> (4) If the insured person is still receiving medical, rehabilitation and attendant care benefits and fails to obtain treatment or participate in rehabilitation in accordance with subsection (2), the insurer may notify the insured person that the insurer intends to stop payment of the income replacement, non-earner or caregiver benefit in accordance with subsection (5).
>
> (5) If at least 10 business days have elapsed after a notice is given under subsection (4) and the insured person has not complied with subsection (2), the insurer may stop payment of the benefit.

[17] Pursuant to s. 57(5), a respondent may only cease payment of a benefit if two elements are met: it must provide the applicant with a notice that is in compliance with subsection (4), and at least 10 business days must have passed after providing this notice.

[18] Though the applicant may take issue with the brief amount of time she was provided to comply, there is no contention that she received over 10 business days between the May 24, 2019 letter and the June 20, 2019 Explanation of Benefits. However, I am not satisfied that the May 24, 2019 letter constitutes proper notice under s. 57(4).

[19] The body of the May 24, 2019 letter to the applicant reads as follows:

> Further to our Explanation of Benefits dated December 27, 2018 with attached I.E. Reports and letter dated February 27, 2019, we ask that you carefully review the reports. As per Dr. Ian J. Harrington's Report he is recommending treatment.
>
> Kindly proceed to meet with your family physician in order to follow the recommendations of the report.

> We are asking this in accordance with Section 57 of the Statutory Accident Benefits Schedule.
>
> Should you have any questions regarding the above please do not hesitate to contact me.

[20] Though there are few specific details under s. 57(4), one of the requirements for a proper notice under this section is that an insurer must inform the insured person that payment of a benefit may be stopped: i.e., "the insurer may notify the insured person that the insurer intends to stop payment of the income replacement, non-earner or caregiver benefit…".

[21] There is no such warning provided in the May 24, 2019 letter. In fact, there is no specific mention of her income replacement benefit at all.

[22] It is well-established at the Tribunal that notices are meant to assist applicants in understanding the adjusting process, especially when an insured person's actions (or inaction) may affect the payment of benefits. Though some sections of the *Schedule* require much more robust details than s. 57(4) (e.g., a notice for an insurer's examination under s. 44[5]), the Legislature still put in place certain requirements for what constitutes proper notice under this provision. I am satisfied that if an applicant is not aware that his or her failure to obtain treatment may lead to a benefit no longer being paid, it cannot be said that a notice under s. 57 has met its intended purpose.

[23] Additionally, the two other records mentioned in the letter (aside from Dr. Harrington's report) are correspondence dated December 27, 2018 and February 27, 2019. While the February 27, 2019 correspondence was the approval of the applicant's income replacement benefit, the December 27, 2018 Explanation of Benefits involved her removal from the *Minor Injury Guideline*. As such, I find that citing both letters only further complicates the meaning that the respondent was trying to communicate in this notice.

[24] Finally, though the respondent argued that the applicant should have reached out to ask the adjuster questions about the May 24, 2019 letter, I find this argument ignores the purpose of notices under the *Schedule.* That is, beyond the fact that it is ultimately an insurer's obligation to adhere to these notice requirements, the applicant's lack of understanding that her income replacement benefit was at risk likely explains why she would not have seen a need to follow up about this letter.

[25] I would also add that, in light of these findings, I do not find it necessary to make a determination on the applicant's argument that she was unaware of the treatment she had to obtain to be in compliance with s. 57 of the *Schedule*.

COSTS

[26] Rule 19 of the *Common Rules of Practice and Procedure* outlines the powers that the Tribunal has to order costs. Briefly, Rule 19.1 states that costs may be

awarded in cases where a party has “acted unreasonably, frivolously, vexatiously, or in bad faith”.

[27] In support of its request for costs, the respondent stated that it was “wholly unreasonable” for the applicant to pursue an income replacement benefit when she was not in compliance with s. 57. I do not find this allegation meets the high standard for a costs order, as there is nothing inherently improper about a party seeking to determine their rights under the *Schedule*. Put another way, though the respondent may take issue with the applicant’s position, a good faith attempt to establish entitlement to a benefit will not—on its own—trigger Rule 19.1.

[28] Then, for the applicant, she based her costs request on the respondent’s alleged failure to comply with the notice provision under s. 57(5), as well as its failure to assist her in understanding these obligations (especially in light of her limited English). I interpret these concerns to be about how the applicant’s claim was adjusted. Since issues with the adjusting of one’s claim are best addressed through an award, I do not find this is an appropriate case for a costs order.

ORDER

[29] The respondent did not provide the applicant with proper notice of its intention to cease payment of her income replacement benefit pursuant to s. 57 of the *Schedule*. As such, s. 57 is not a bar to the applicant’s claim for an income replacement benefit.

[30] No costs shall be ordered for either side.

Released: January 28, 2021

CRAIG MAZEROLLE
Adjudicator