

Dear Parties,

**RE: Tribunal File No: 23-002811/AABS  
Sofia Roble vs. Chubb Insurance Company of Canada**

Please see the attached AABS Preliminary Decision related to your Automobile Accident Benefits Service dispute.

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Sincerely,

Pamela Austrie-Christian  
Case Management Officer  
Licence Appeal Tribunal  
Tribunals Ontario  
General Inquiries: 416-326-1356 | Toll Free: 1-888-444-0240  
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Tribunals Ontario  
**Licence Appeal Tribunal**

Tribunaux décisionnels Ontario  
**Tribunal d'appel en matière de permis**



**Citation: Roble v. Chubb Insurance 2023 ONLAT 23-002811/AABS-PI**

**Licence Appeal Tribunal File Number: 23-002811/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:

**Sofia Roble**

**Applicant**

and

**Chubb Insurance**

**Respondent**

**PRELIMINARY ISSUE HEARING DECISION AND ORDER**

**ADJUDICATOR: Ulana Pahuta**

**APPEARANCES:**

For the Applicant: Joel E. Lewis, Paralegal

For the Respondent: Karly Lyons, Counsel

**HEARD: By way of written submissions**

## OVERVIEW

- [1] Sofia Roble, the applicant, was involved in an automobile accident on September 18, 2020 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, Chubb Insurance, the respondent, 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 precluded from making a claim for accident benefits under the *Schedule* because the applicant made an election pursuant to section 61(2) of the *Schedule* for the primary purpose of receiving benefits under the *Schedule*?

## RESULT

- [3] I find that the applicant is statute-barred under s. 61 of the *Schedule*.

## BACKGROUND

- [4] The applicant was involved in a motor vehicle accident on September 18, 2020, during the course of her employment, while driving her company’s vehicle. On February 20, 2021, the applicant submitted an application for accident benefits to the respondent. The respondent notified the applicant by correspondence dated March 9, 2021, that they had reason to believe that the accident happened during the course of the applicant’s employment, and that pursuant to s. 61 of the *Schedule*, an election was required. The respondent noted that such election could not be made for the sole purpose of obtaining accident benefits, and asked for proof that the tort action had been commenced and a copy of the executed WSIB assignment.
- [5] The applicant forwarded her executed WSIB assignment to the respondent on April 28, 2021. On September 9, 2021, the applicant’s representative provided the respondent with a copy of the Notice Letter of Intent, which had been mailed to the alleged tortfeasor and his insurer.
- [6] A year later, on September 18, 2022, the limitation period for the applicant to issue a Statement of Claim on the tort claim, expired. On November 10, 2022, and January 9, 2023, the respondent wrote to the applicant, requesting a copy of

the Statement of Claim. The applicant subsequently issued a Statement of Claim on January 19, 2023. By way of letter dated February 22, 2023, the respondent informed the applicant that the Statement of Claim was filed outside of the two-year limitation period and that as such, she would be barred from proceeding against the other party. The respondent noted that the claim would be handled by WSIB and that the applicant should contact the WSIB regarding next steps.

- [7] The respondent submits that the applicant has not made a proper election under s. 61(2) of the *Schedule*. It argues that the evidence establishes that she opted out of WSIB for the primary purpose of obtaining accident benefits, and not to pursue a tort claim. As such, it argues that the applicant should be barred from pursuing her claim to accident benefits.
- [8] The applicant argues that at the time of her election, she intended to pursue a tort action against the other driver and that the requirements of s. 61(2) of the *Schedule* were met. She submits that she should be permitted to proceed with her appeal.

## ANALYSIS

### **Law - Section 61**

- [9] 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 *Workplace Safety and Insurance Act, 1997*. 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.
- [10] 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.
- [11] Section 61(5) states that, despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under the *Schedule* pending resolution of the dispute if, (a) the person makes an assignment to the insurer of any benefits under any workers'

compensation law or plan to which he or she is or may become entitled as a result of the accident; and (b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment.

- [12] I find that the following principles set out in *16-002364 v The Personal Insurance Company, 2017 CanLII 148445 (ON LAT)* are persuasive and helpful in determining the “primary purpose” of an election under s. 61(2):
- (i) It is the applicant's obligation to prove that their election for tort and accident benefits falls within the exception of s. 61 of the *Schedule* and this determination is largely fact driven;
  - (ii) The relevant point of time when determining the applicant's “primary purpose” is at the time of the election;
  - (iii) Determining the “primary purpose” involves determining the applicant's mindset at the time of the election and, therefore, the test is inherently a subjective one to consider if the choice was made in good faith;
  - (iv) Although the test is subjective, the Tribunal must consider “objective” factors in evaluating the applicant's motives. These factors include the strength of the court action, the steps taken to pursue the claim, and any advantages that might have led the applicant to choose accident benefits over WSIB benefits. Action or inaction since the election and the strength of the action can shed light on the true mindset of the applicant. Challenges to successfully establishing liability in tort are also a factor to consider; and
  - (v) The election must be a “real choice” as opposed to forum shopping on the question of disabilities although there may be circumstances where a *bona fide* re-election can be made after a final refusal for benefits by the WSIB.

### ***The applicant's primary purpose***

- [13] I find that the applicant did elect out of the *WSIA* for the primary purpose of claiming accident benefits.
- [14] When applying the principles set out in *16-002364 v The Personal Insurance*, I note that while the test to determine the applicant's mindset at the time of election is subjective, “objective” factors can guide my assessment of the applicant's mindset. Such factors can include the steps taken to pursue the

claim, action or inaction since the election and the strength of the court action. In the matter at hand, I agree with the respondent that the applicant has not led sufficient evidence to establish a *bona fide* intention to issue a tort claim.

- [15] With respect to the applicant's steps to pursue the tort claim, the applicant initially applied for accident benefits on February 20, 2021. The respondent informed her soon after that a proper election would have to be completed pursuant to s. 30 and requested proof that a tort action was commenced. While the applicant provided the election soon afterwards, it was only six months later that the applicant's representative forwarded a Notice Letter of Intent, that had been sent to the alleged tortfeasor. The applicant does not direct me to any subsequent efforts to pursue the tort claim, until after the expiration of the statutory limitation period, more than a year later.
- [16] I agree with the respondent and the cited caselaw, that the applicant's inaction in pursuing her tort claim supports its position that the applicant has made an election primarily for the purpose of claiming accident benefits. The applicant issued her Statement of Claim on January 19, 2023, four months after the expiration of the limitation period. I note the respondent's argument that this Statement of Claim was only issued after the respondent twice inquired about the status of the claim, on November 10, 2022 and January 9, 2023. I am persuaded by the decision cited by the respondent, *Mahjourian v TD*, ONFSCDRS 111 that a claim filed late and only in response to an insurer's inquiry, is a key factor suggesting that an applicant has not made a proper election.
- [17] The applicant argues that her delay in pursuing her tort application was due to her difficulty in obtaining representation and navigating the claims process during Covid restrictions. She further cites the Tribunal decision *Thiyagarajah v. Economical Insurance*, in support of her claim that litigation is "complicated and risky" and that the fact that a claimant later decided not to pursue the tort claim, does not diminish the possibility of litigation as a valid goal immediately following the accident.
- [18] I am not persuaded by the applicant's argument. Firstly, the applicant had legal representation from April 14, 2021, more than a year and a half before her Statement of Claim was filed. Further, although Covid restrictions were cited as a reason for her delay in obtaining representation, such representation was retained well-before the expiration of the limitation period. Moreover, I find that the decision relied upon by the applicant, *Thiyagarajah*, is distinguishable on its facts. In *Thiyagarajah*, the applicant had sent a notice of intention to the at-fault driver prior to electing to receive accident-benefits. The Tribunal found that this

supported the applicant's intention to pursue court action. However, in *Thiyagarajah* the applicant subsequently received correspondence from his counsel addressing a hurdle to the tort claim, despite the applicant not being at fault. This led to the applicant subsequently reconsidering litigation.

- [19] In contrast to *Thiyagarajah*, in the matter at hand the applicant did not send her notice of intention prior to, or even contemporaneously with her election, and only did so after the issue was raised by the respondent. In terms of the delay in filing a Statement of Claim, the applicant does not direct me to any hurdle to the tort claim, such as was identified in *Thiyagarajah*. Further, the claimant in *Thiyagarajah* was noted not to have been at fault in the accident. In the present case, the applicant has not made any submissions or provided any evidence as to the strength of her tort claim. Rather, the respondent has provided evidence indicating that the applicant was at fault in the accident.
- [20] The applicant further relies on *16-002364 v The Personal Insurance*, however, I find that this case is distinguishable. In *16-002364*, the applicant provided affidavits that showed her intention to pursue the tort action. Moreover, the Tribunal had expressly noted that the applicant had filed her statement of claim in a timely manner. This did not happen in matter at hand. Nor did the applicant's legal representative provide an affidavit or supporting evidence to show that the tort action is viable as did the counsel in *16-002364/AABS*. I further am not persuaded by the applicant's argument that the "discoverability rule" would apply to her late filing. I agree with the respondent that the evidence establishes that she was aware of her injuries at the date of loss.
- [21] The applicant also raises the additional argument that she did "not have access to WSIB benefits". However, no evidence was provided in support of this claim other than the applicant's statement that she was not aware whether her employer reported this incident to WSIB. The applicant has not provided any supporting evidence as to why she was not eligible for WSIB benefits. I note that it is well-settled that submissions alone are not evidence. Rather, evidence must be provided in support of a claim. Further, I note the respondent's submissions that WSIB was notified of the claim through the assignment process, and that a failure of the applicant's employer to report the claim to WSIB would not automatically deny the applicant from access to WSIB benefits. The applicant has not led sufficient evidence to support her claim that she is not entitled to WSIB benefits.

[22] As such, I am not persuaded that the applicant had a *bona fide* intention to commence a tort action, and find that the applicant did elect out of the WSIA for the primary purpose of claiming accident benefits.

**ORDER**

[23] For the foregoing reasons, I find that the applicant is statute-barred under s. 61 of the *Schedule* from proceeding with her application for accident benefits at the Tribunal. As a result, the application is dismissed.

**Released: March 12, 2024**



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**Ulana Pahuta  
Adjudicator**