



**Citation: Rahvar v. Economical Insurance, 2024 ONLAT
23-009837/AABS-PI**

Licence Appeal Tribunal File Number: 23-009837/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:

Roghayeh Rahvar

Applicant

and

Economical Insurance

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: Bonnie Oakes Charron

APPEARANCES:

For the Applicant: Kiamehr Yazdani, Counsel

For the Respondent: Colin MacDonald, Counsel

Heard: By Way of Written Submissions

OVERVIEW

- [1] Roghayeh Hossein Zadeh Rahvar (“the applicant”) was involved in an incident on November 14, 2021, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016) (the “Schedule”)*. The applicant was denied benefits by Economical Insurance (“the respondent”) and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

- [2] The preliminary issue to be decided is whether the applicant is barred from proceeding with their claim for benefits as they failed to submit the application for benefits (OCF-1) within the time prescribed in the *Schedule*?

RESULT

- [3] The applicant is statute-barred from proceeding with her application.

PROCEDURAL ISSUE

- [4] The parties sought direction from the Tribunal after the applicant did not file submissions in accordance with the timetable agreed to in the case conference report and order (“CCRO”).
- [5] The applicant advised the Tribunal that it had not received the respondent’s submissions, perhaps due to an email technicality, despite the respondent having a Certificate of Service.
- [6] As the Tribunal did not provide any direction, the parties agreed between themselves to extend the timeline for the applicant’s submissions and the respondent’s reply.
- [7] While the process is to be controlled by the Tribunal itself, I acknowledge that no direction was provided to the parties’ inquiries.
- [8] Under the circumstances, I find that the hearing can proceed given I have a full set of submissions before me and am satisfied that neither party was prejudiced by the extended timelines outside those set by the CCRO.

ANALYSIS

Law

- [9] Section 32(1) of the *Schedule* provides that a person who intends to apply for accident benefits shall notify the insurer of their 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.
- [10] Once an insurer receives notice of an applicant's intention to apply for statutory accident benefits, the insurer must provide the applicant with the appropriate OCF-1 forms, a written explanation of the benefits available, information to assist the person in applying for benefits and information on the election relating to the specified benefits, if applicable (s. 32(2)). Pursuant to section 32(5) of the *Schedule*, the applicant must then submit a completed and signed application for benefits to the respondent within 30 days after receiving the forms.
- [11] Section 34 of the *Schedule* states that "a person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation." The onus is on the applicant to establish a reasonable explanation for the delay. The interpretation of "reasonable explanation" is guided by *Horvath and Allstate Insurance Company of Canada*, 2003 ONFSCDRS 92 (CanLII), and was more recently reiterated in *K.H. vs Northbridge*, 2019 CanLII 101613 (ON LAT). The guiding principles are summarized as follows:
- i. An explanation must be determined to be credible or worthy of belief before its reasonableness can be assessed.
 - ii. The onus is on the insured person to establish a "reasonable explanation."
 - iii. Ignorance of the law alone is not a "reasonable explanation".
 - iv. The test for "reasonable explanation" is both a subjective and objective test that should take account of both personal characteristics and a "reasonable person" standard.
 - v. The lack of prejudice to the insurer does not make an explanation automatically reasonable.

- vi. An assessment of reasonableness includes a balancing of prejudice to the insurer, hardship to the claimant and whether it is equitable to relieve against the consequences of the failure to comply with the time limit.

Background and Parties' Positions

- [12] On November 14, 2021, the applicant was involved in the subject accident, and two days later, informed the respondent's property damage division about the accident.
- [13] On March 10, 2022, the applicant consulted her general physician ("GP"), Dr. Shakib, and reported intermittent back pain over several months, with radiation to the right leg. Dr. Shakib assessed musculoskeletal pain, made referrals for physiotherapy and x-rays, prescribed medication, and referred her to a pain clinic. There is no mention of the accident in Dr. Shakib's clinical notes and records (CNR).
- [14] On April 8, 2022, the Toronto Pain Clinic provided a report to Dr. Shakib, a report that records the reason for referral as pain in the lower back and legs "for about three years." There is no mention of the accident in the report.
- [15] Many months later, on September 27, 2022, the applicant notified the respondent of her intention to claim accident benefits as a result of the November 14, 2021 accident.
- [16] On October 3, 2022, close to one year after the accident, the applicant applied for accident benefits. The respondent received the OCF-1 on October 17, 2022. The applicant also submitted an OCF-3 certified by chiropractor Dr. Raffi on November 2, 2022. It recorded the following:
 - i. the applicant's symptoms first appeared on November 14, 2021;
 - ii. the first post-accident medical exam was on October 27, 2022;
 - iii. the identified injuries were whiplash, radiculopathy, and headaches;
 - iv. there were no pre-accident medical conditions; and
 - v. the applicant was having difficulty with work and housekeeping tasks.
- [17] On November 16, 2022, the respondent notified the applicant by letter that both her OCF-1 and OCF-3 had been received, although she failed to meet the timelines prescribed in s. 32. Further, it requested an explanation for the delay pursuant to s. 34 and a Statutory Declaration.

- [18] The applicant responded on January 26, 2023. Her Statutory Declaration identified the reason behind the delay, namely that she did not feel pain at first because she was receiving treatment for sciatica, and later her doctor recommended x-rays and more treatment. While she adds to her statement that the doctor's recommendations were as a result of the accident, I found no references to the accident in either Dr. Shakib's CNRs or in the report from the Toronto Pain Clinic.
- [19] On March 20, 2023, the respondent notified the applicant that she had not provided a reasonable explanation for the delay.
- [20] The respondent submits that the applicant failed to provide a reasonable explanation for the delay in applying for benefits, and moreover, the information about her post-accident symptoms is contradictory. It submits the date of her first symptoms, as per the OCF-3, contradicts her explanation for the delay in her Statutory Declaration.
- [21] The applicant submits that she did indeed notify the respondent of the accident and has a reasonable explanation for the delay in applying for benefits. She submits that her injuries were latent, and she did not become aware of the need for treatment until meeting her GP.
- [22] The respondent requests an order that the applicant is barred from proceeding with the application due to her lack of compliance with the timelines prescribed by s. 32 of the *Schedule*. For her part, the applicant seeks an order that the preliminary issue be dismissed, and her application proceed to the hearing.

Did the applicant fail to comply with the timelines established by s. 32?

- [23] I find that the applicant failed to comply with the timelines established in s. 32 of the *Schedule*.
- [24] It is undisputed that the applicant submitted her OCF-1 close to a year after the accident. I agree with the respondent that this is well-outside the seven days, or as soon as practicable, as specified in s. 32(1) of the *Schedule*.
- [25] The applicant points to *Adjetey v. Economical Insurance*, 2023 CanLII 1466 (ON LAT) to show that the forms must first be provided before the applicant can send in the OCF-1. She argues that it is the respondent that is at fault because she reported the accident, but it did not send her the necessary forms. I am not persuaded by this reasoning.

- [26] The applicant contacted the property damage adjuster not the accident benefits adjuster. The respondent sent out the package once it was notified of her intentions. Though she returned it within 30 days, she had already failed to meet the initial notification period of seven days from the date of loss.
- [27] While it is clear the applicant's actions were not compliant with s. 32 of the *Schedule*, she submits that she has a reasonable explanation for the delay pursuant to s.34.

Has the applicant established a reasonable explanation for the delay?

- [28] I find that the applicant has not provided a reasonable explanation for the delay in notifying the respondent of her intention to apply for accident benefits by submitting a completed OCF-1.
- [29] The principles established in *Horvath* require that before an explanation can be evaluated as to whether it is reasonable, it must first be found credible.
- [30] The applicant's explanation is not credible. The submission that she did not know she was injured and became aware of this only later on when her GP referred her for x-rays is not convincing. The appointment with her doctor was several months after the accident, on March 10, 2022, and there is no mention of the subject accident in the CNR. Nor is there an explanation for the gap between March 10 and September 27, 2022, the date she notified the insurer of her intentions.
- [31] The OCF-3 indicated that her symptoms began on the day of the accident. The information that her injuries began on the day of the accident and her statement that she did not know she was injured are contradictory. Both cannot be true.
- [32] If the OCF-3 is accurate, and the symptoms appeared on the day of the accident, there is no explanation for why the applicant did not report her injuries until she first visited her GP.
- [33] If it is the Statutory Declaration that is accurate, then it refers the reader back to the OCF-3 for the list of relevant injuries and is certified as stating that her symptoms first appeared on the day of the accident.
- [34] While the applicant may have notified the respondent's property damage division of the damage to her car, there is no evidence before me that she also notified it of an intention to apply for accident benefits.

- [35] Neither is the explanation provided, about having latent injuries, persuasive given there is other evidence that contradicts this statement. I am not persuaded by the applicant's argument that she was unaware of any accident-related injuries until her visit with Dr. Shakib many months after the accident. The OCF-3 states that the symptoms first appeared on the day of the accident.
- [36] Thus, the explanation offered – that she did not know about the injuries – is not credible. As a result, it is not necessary to assess whether the explanation is reasonable or not, as per *Horvath*.
- [37] Still, beyond the lack of a credible explanation, I also agree with several other factors raised by the respondent. First, from both a subjective and objective perspective, a reasonable person would have reported injuries that first appeared on the day of the accident. Second, with the lengthy delay between the accident and the claim for benefits, the respondent was unable to assess the applicant's injuries to determine her benefit eligibility in a contemporaneous manner. Third, once the claim was made, the applicant did not provide the CNRs requested by the respondent despite several requests on November 29, 2023, January 10, 2024, and February 5, 2024. Eventually, a production order from the Tribunal was made at the case conference of February 26, 2024.
- [38] For the reasons outlined above, the applicant has not met her onus to use s. 34 as a means of mitigating her non-compliance with s. 32 of the *Schedule*.

Section 55

- [39] Pursuant to s. 55(1)1 of the *Schedule*, an insured person shall not apply to the Tribunal under subsection 280(2) of the *Insurance Act* if 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 times prescribed in s. 32.
- [40] As outlined above, I find that the applicant did not notify the respondent of the accident within the timelines prescribed by the *Schedule* and has not provided a reasonable explanation for the delay. Accordingly, I find that the applicant is statute-barred from proceeding with her application before the Tribunal.

ORDER

[41] The applicant is barred by s. 55(1)1 of the *Schedule* from proceeding with her application. The application is dismissed. The Tribunal shall vacate any date that has been scheduled for the substantive issue hearing.

Released: April 29, 2024



Bonnie Oakes Charron
Adjudicator