Citation: DC v. TD Insurance Meloche Monnex, 2023 ONLAT 21-015015/AABS

Licence Appeal Tribunal File Number: 21-015015/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:

DC, a minor by his custodian, David Sider

Applicant

and

TD Insurance Meloche Monnex

Respondent

DECISION

ADJUDICATOR: **Deborah Neilson**

APPEARANCES:

For the Applicant: David Sider, The Children's Aid Society of Hamilton
Brent McQuestion, Counsel

For the Respondent: Cara Boddy, Counsel

HEARD: **In Writing**

OVERVIEW

[1] DC, the applicant, was involved in an automobile accident on **September 20, 2019**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by the respondent, TD Insurance Meloche Monnex, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant was born in 2007 and, accordingly, is presently 15 years old. On consent of the parties, I am issuing an order anonymizing the applicant's name, and redacting his foster parents' names and his day and month of birth in the Tribunal's decision and in the adjudicative records. My order dispenses with notice to the media.

[3] The applicant is claiming entitlement to non-earner benefits ("NEBS") as a result of his accident injuries, an award under s. 10 of Regulation 664 ("award") and interest.. The respondent submits that I have no jurisdiction to hear the matter because the applicant is seeking declaratory relief as there is no issue in dispute.

[4] I find that there is an issue in dispute and, accordingly, the Tribunal has jurisdiction to hear this matter. I also find that the applicant is entitled to NEBs.

ISSUES

[5] The issues in dispute listed in the Tribunal's case conference Order are:

i. Is the applicant entitled to a non-earner benefit of $185.00 per week from December 13, 2019, to date and ongoing?

ii. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

iii. Is the applicant entitled to interest on any overdue payment of benefits?

[6] The applicant concedes that neither interest nor a Reg. 664 are payable. Accordingly, those claims dismissed. The parties, however, have both indicated that the first issue in dispute is something different from the case conference Order. The applicant submits the first issue is as follows:

i. Notwithstanding the applicant satisfies s. 12(1)2(i) of the *Schedule*, do the provisions of s.12(3) of the *Schedule* operate such that the respondent was not (or is not) required to pay NEBs to the applicant?

[7] The respondent submits the first issue is as follows:

i. Whether the applicant is entitled to NEBs in the amount of $18,500.00?

ANONYMIZING ORDER

[8] Normally, the Tribunal's decisions include the names of the parties to the proceeding, in accordance with the open court principle: see *Toronto Star v. AG Ontario*, 2018 ONSC 2586. As public access to tribunal proceedings is protected by s. 2(b) of the *Charter of Rights and Freedoms*, the Tribunal will only exceptionally restrict public access to the identity of parties by anonymizing or initializing their names in its decisions. Before the Tribunal will anonymize a decision, it must be satisfied that the interest in safeguarding personal privacy in a particular case outweighs the public interest in including that information in the publicly accessible decision.

[9] Pursuant to s. 2(2) of the *Tribunal Adjudicative Records Act* ("*TARA*"), the Tribunal may order that all or part of an adjudicative record be treated as confidential and not disclosed to the public if the Tribunal determines that:

a. matters involving public security may be disclosed; or

b. intimate financial or personal matters or other matters contained in the record are of such a nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public.

[10] Rule 13.1 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* ("*Rules*") is consistent with *TARA* and permits the Tribunal to restrict public access to the adjudicative record on the same grounds.

[11] The test established by the Supreme Court of Canada for ordering publication bans provides further guidance when considering whether to override the principle that tribunal hearings should be open to the public: *Toronto Star* at paras. 89-93; *R. v. Mentuck*, 2001 SCC 76 at para. 32. The test was recently recast by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25. The Court held that a person seeking to limit the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[12] It is well settled that the law recognizes that minors are especially vulnerable to intrusions of privacy. For these reasons, I find that notice to the media is not necessary. Further, the notice to the media would delay in the release of the decision. I find that the interest of the public and the parties in reducing the delay of the time required to release a decision in this case outweighs the importance to the media in receiving notice of the intention to release this order. Especially as the media would likely not provide any other evidence or argument that I have not already considered.

[13] The minor in this case suffered a traumatic brain injury resulting in catastrophic impairment and has significant ongoing cognitive, psychological and behavioural symptoms, rendering him particularly vulnerable, especially to anyone intent on taking advantage of his deficits. He is also vulnerable to psychological harm because of the stigma associated with his cognitive and psychological diagnoses if he was publicly identified by his name, age and foster parents' identity. He is, therefore, not in a position to ensure control over information about himself that reveals something close to the core of his identity. Given the nature of the claim, for a determination of entitlement to a sum of money, the risk of harm to the minor applicant outweighs any risk to the public interest in not knowing who he is.

[14] I find that anonymizing the decision and redacting the Tribunal's adjudication file of the applicant's name and birthdate, his foster parents' names and his address reduces the personal risk to the applicant, preserves his dignity as a minor, and yet fosters transparency by allowing the public access to the file and to understand the reasons for my decision. In other words, the anonymizing order protects the applicant's identity and the public interest in protecting the privacy of those most vulnerable in society with the minimum infringement on the public's right to a transparent proceeding. Accordingly, the applicant shall only be identified by the initials DC and his year of birth or age and his name, address, month and day of birth, and his foster parents' names shall be redacted from the Tribunal's adjudication file.

ANALYSIS

[15] Section 12(1) of the *Schedule* provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the accident, if 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 was enrolled on a full-time basis in elementary, secondary or post-secondary education at the time of the accident.

[16] The applicant sustained a catastrophic impairment in the accident, and there is no dispute that, as a result of the accident, he had a complete inability to carry on a normal life between September 20, 2019 and September 20, 2021. However, under s.12(3)(b) of the *Schedule*, an insurer is not required to pay a non-earner benefit before the insured person is 18 years of age. Under s.12(3)(c) an insurer is not required to pay NEBs for more than 104 weeks after the accident. Nor is an insurer required under s.12(3)(a) to pay any NEBs for the first 4 weeks after the onset of the complete inability to carry on a normal life.

[17] The applicant submits that, because he met the test for entitlement to NEBs for the two year period following the accident, the respondent is required to pay him NEBs in the amount of $18,500 when he turns 18 years old for the period from October 18, 2019 to September 20, 2021. The respondent submits that the applicant is barred from ever claiming NEBs, as he cannot reach the age of 18 within the post-104 week period. It also submits that, until the applicant reaches age 18, there is no requirement to pay any NEBs and, therefore, there is no issue in dispute. It submits that, if I were to proceed in determining whether the NEB is payable when the applicant turns 18 years old, I would be providing declaratory relief, which I have no authority or jurisdiction to provide. Accordingly, I must first determine whether or not I have the jurisdiction to hear any of the issues put forth by the parties and the Tribunal case conference order.

I have jurisdiction to hear the issue in dispute

[18] The respondent submits that I cannot order NEBs to be paid, because they are not payable before the applicant reaches age 18, and that will not occur for another two plus years. It submits that the Tribunal cannot order benefits paid at a point in the future and that there is no authority for the Tribunal to provide declaratory relief. The applicant submits that my authority and jurisdiction to make a determination is found in s.280 of the *Insurance Act*, RSO 1990, c I.8.

[19] Under s.280(2) of the *Insurance Act,* an insured person or the insurer may apply to the Tribunal to resolve a dispute with respect to an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory

accident benefits to which an insured person is entitled. Under s.280(3) of the *Insurance Act*, they are barred from bringing such a proceeding in any court, other than an appeal or application for judicial review of a Tribunal decision. The Court of Appeal decision of *Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615 (CanLII) (*Stegenga*) determined that s.280(1) of the *Insurance Act*, which states that section applies with respect to the resolution of disputes in respect of an insured person's entitlement to accident benefits, confers broad powers on the Tribunal. In that case, the plaintiff issued a court action against an insurer claiming punitive damages for breach of the duty of good faith because the Tribunal does not have the jurisdiction to award punitive damages. The Court of Appeal held that if the dispute relates to the insurer's compliance with obligations to the insured concerning the *Schedule*, the timeliness of performance of those obligations and/or the manner in which they were administered, it falls within the broad reach of s. 280 of the *Insurance Act* and within the jurisdiction of the Tribunal. The prohibition on court proceedings will apply.

[20] The Court of Appeal also held at paragraph 44 of *Stegenga* that the term "entitlement" is a term of wide meaning and embraces the content of what benefits an insured person has a right to receive, when they have a right to receive those benefits, and the manner of performance by the insurer they have a right to receive. According to the Court of Appeal, the *Insurance Act* allows the Tribunal to determine if and/or when a benefit is payable if there is a dispute about it. The Court of Appeal clearly determined that the Tribunal has jurisdiction to hear disputes about when in the future an insurer's obligation to provide benefits should be performed.

[21] The respondent relies on the Tribunal's reconsideration decision of *16-000179 v Old Republic Insurance Company,* 2016 CanLII 93137 (ON LAT) (*16-000179 v Old Republic*). In that case the Tribunal determined that it cannot order an insurer to pay benefits into the future as doing so would amount to fettering an insurer's ongoing obligation to adjust a claim. The respondent submits this means that, because NEBs are not payable for another two years, if at all, a request for an order requiring payment is premature and outside of the Tribunal's jurisdiction. The respondent also relies on *Zhu v The Co-operators General Insurance Company*, 2023 CanLII 139 (ON LAT) (*Zhu v The Co-operators*), in which I stated that I had been provided with no authority to show I had the jurisdiction and authority to order payment of NEBs into the future.

[22] The applicant submits that *16-000179 v Old Republic* is distinguishable because it dealt with entitlement in the future to the payment of benefits, unlike this case,

which deals with the payment in the future of benefits for past entitlement. This is persuasive reasoning. He also submits that *Zhu v The Co-operators* is distinguishable because it also involved an insured person who sought entitlement to the payment of future NEBs beyond the two year maximum quantum allowed under s.12(3)(c) of the *Schedule*.

[23] I disagree that *Zhu v The Co-operators* is distinguishable. It addresses the very same type of future claim as described in the Order before me and as stated on the application – entitlement to NEBs from December 13, 2019, to date **and ongoing** (emphasis mine)**.** To the extent that the parties agreed at the case conference that the issue I must decide is whether the applicant is entitled to NEBs to date and ongoing, I agree with the respondent that I do not have the jurisdiction to determine entitlement of NEBs into the future. Further, as NEBs are not payable for more than 104 weeks after the accident, there is no entitlement to ongoing payment of NEBs as explained in *Zhu v The Co-operators*. Further, the Tribunal in *Zhu v The Co-operators* had the jurisdiction to determine entitlement to NEBs up to the 104 week post accident mark, as it was an issue in dispute, just as it is an issue in dispute in this case.

[24] The issue framed by the applicant together with the order he seeks is for payment of an NEB now or at some future point by the respondent. It is clear that I cannot order the respondent to pay NEBs now as it is not required to pay any NEBs to the applicant until he is 18 years old. I agree with the respondent that I cannot make an order for a future payment - that the applicant be paid NEBs regardless of whether he is still living at the age of 18. Such an order would fetter the respondent's obligation for ongoing adjustment of the claim.

[25] The respondent submits that I have no jurisdiction to provide declaratory relief. I agree with it, but only where entitlement is not an issue in dispute. The respondent relies on the Tribunal 's reconsideration in *M.I. v. Coseco Insurance Company*, 2021 CanLII 40712 (ON LAT) 18-000742/AABS-R as support for its submission. The Tribunal clearly stated in that matter that it has no jurisdiction to award declaratory relief when entitlement and quantum of benefits are not in issue. That decision does not assist the respondent because entitlement to NEBs is in issue.

[26] As set out by the Court of Appeal in *Tomec v. Economical Mutual Insurance Company,* 2019 ONCA 882 (CanLII) (*Tomec)* at para. 36, the refusal to pay a benefit is clearly tied to the applicant's cause of action. Absent a refusal to pay the benefit sought, there cannot be a claim made for mediation or an evaluation. Thus, the refusal to pay a benefit and the ability to make a claim are inextricably

intertwined in the cause of action. The refusal cannot be stripped out of the cause of action and treated as if it is independent from it.

[27] I am bound by *Stegenga,* which clearly held that the Tribunal has jurisdiction over disputes related to entitlement. Although any NEB the applicant may be entitled to is not payable unless he reaches the age of 18, the respondent, nevertheless, denied that he is entitled to NEBs regardless as set out in its letter dated December 13, 2019. The respondent's denial of entitlement is exactly what s.280 of the *Insurance Act* confers jurisdiction on me to address. Otherwise, the applicant may be barred from disputing the claim under s.56 of the *Schedule*.

[28] Section 6 of the *Limitations Act, 2002,* SO 2002, c 24 states that the two year limitation period in s.4 of that *Act* does not start to run during any time that the claimant is a minor. However, the *Limitations Act, 2002* only applies to court actions. There is no similar suspension of a limitation period for a minor in either s.56 of the *Schedule* or the *Insurance Act.* The only potential suspension is the discretionary allowance in s.7 of the *Licence Appeal Tribunal Act, 1999,* SO 1999, c 12 Sch G. Since s.7 is discretionary, there is no guarantee that the applicant would not be statute barred if he did not dispute the respondent's December 13, 2019 denial of his entitlement to NEBs at this time.

[29] If there had been no denial of NEBs, I would have agreed with the respondent and determined that I do not have jurisdiction to hear this matter. However, because the respondent denied that the applicant was entitled to NEBs on December 13, 2019, it put the applicant's entitlement to NEBs directly in dispute. For this reason, I find I have the jurisdiction to determine whether the applicant is barred from claiming NEBs on the basis that he would not reach the age of 18 prior to the two year eligibility period.

The applicant is entitled to NEBs despite not being 18 years of age during the post-104 week period

[30] The respondent submits that, despite the applicant having a complete inability to carry on a normal life, the applicant will never be entitled to NEBs because NEBs are not payable for more than 104 weeks following the accident and are not payable before the applicant is 18 years old. As the applicant will not be 18 years old within 104 weeks of the accident, NEBs will never be payable.

[31] The applicant submits that, if I were to accept the respondent's interpretation of the *Schedule*, the requirement in s.12(1)2(i) of the *Schedule* for the insured person to also be enrolled in elementary school at the time of the accident to qualify for NEBs would be redundant.

[32] The respondent disagrees with the applicant's submission that the wording in s.12(1) should impact how s.12(3) is applied.

[33] I am bound by *Dominion of Canada General Insurance Company v. Ridi*, 2022 ONCA 564 (CanLII) (*Ridi*), relied upon by the applicant. The Court of Appeal in *Ridi* repeated the Supreme Court of Canada's determination of how statutes are to be interpreted as set out in *Rizzo & Rizzo Shoes Ltd, (Re),* [1998] 1 S.C.R. 27, at para. 21. When interpreting statutes, words are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[34] The respondent submits that the application of s. 12(3) is entirely divorced from s. 12(1) of the *Schedule*. This is because s. 12(1) identifies the criteria for NEB qualification: those insured persons who (a) meet the test of entitlement and (b) do not qualify for an IRB; and those who (a) meet the test of entitlement and (b) are enrolled in full-time education or completed their education within one year before the accident, regardless of whether they were entitled to an IRB. The respondent submits that s.12(3) limits the circumstances in which NEB is payable and operates as an exclusion clause.

[35] I disagree with the respondent's submission on how s.12(1) affects the interpretation of s.12(3) of the *Schedule.* It provided no authority for why s.12(1) and (3) should not be read harmoniously together. Just because s.12(3) sets out when an insurer is not required to pay NEBs, that does not mean that it is to be read in isolation from s.12(1) or the remainder of the *Schedule.* I prefer the applicant's interpretation at he reads ss.12(1) and (3) in their entire context and harmoniously, which is what I am bound by the case law to do.

[36] The Court of Appeal in *Tomec* stated that statutes are to be interpreted in a manner that does not lead to absurd results. As stated in *Rizzo & Rizzo Shoes Ltd, (Re)*, an interpretation is absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment. Although *Tomec* dealt with a different version of the *Schedule,* I am still bound by *Tomec* with respect to how statutes are to be interpreted.

[37] I agree with the applicant's interpretation because the respondent's interpretation would lead to an absurdity. Under the respondent's interpretation of the *Schedule,* any elementary school student would never reach the age of 18 within 104 weeks of the accident. Therefore, every elementary school student with a complete inability to carry on a normal life would never meet the test for

entitlement to NEBS based on their age. This is an absurdity. If the Legislature intended for the *Schedule* to be interpreted in the manner proposed by the respondent, then it would never have included elementary school students in s.12(1)2(i) of the *Schedule*.

[38] Further, if the Legislature had intended for NEBs to never be paid to a minor for the 104 week period following an accident, the *Schedule* would have used the wording set out in s.12 of the *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996* ("*SABS*"). Section 12(7)(b) of the *SABS* stated that the insurer is not required to pay an NEB **for any period** before the insured person attains 16 years of age (emphasis mine). The absence of any language in s.12(1) the *Schedule* stating that the benefit is not payable for "any period" before the insured person reaches 18 years of age is a good indication the Legislature did not intend s.12 to be interpreted in the manner the respondent suggests.

[39] It is trite law, as noted in *Tomec*, that the *Schedule* is remedial and consumer protection legislation. The applicant's interpretation endorses the remedial, consumer-oriented purpose of the legislation. Further, the Legislature's purpose of reducing the cost of insurance premiums is not overturned by the applicant's interpretation. This is because NEBs are limited to 100 weeks or a maximum of $18,500.00 for minors. This is a reduction from the NEB payable for accidents prior to June 1, 2016. Prior to O. Reg. 251/15 coming to force, the NEB was payable for life and increased from $185.00 per week to $320.00 per week for qualifying minor students after 104 weeks of disability.

[40] The respondent submits that the applicant's interpretation would mean the 104 week period may take place at any time between the date of the accident and when the applicant turns 18. If that was the applicant's interpretation, then I would reject it. I agree with the respondent that the 104 weeks after the accident qualifying period in s.12(1)2 and in the payment period in s.12(3) of the *Schedule* is tied to the accident date and is not any other 104 week period. Otherwise, the Legislature would have left out the words "after the accident" and would have only used the words "104 weeks." However, s.12(3)(c) does not need to refer to any 104 week post-accident period for a minor to be entitled to receive the NEB at the age of 18.

[41] I do not agree with the respondent that payment of NEBs when an insured person reaches the age of 18 means the 104 week qualifying period is any 104 week period. I am persuaded by the applicant's submissions with respect to *Aviva Insurance Company of Canada v. Danay Suarez*, 2021 ONSC 6200

(CanLII) (Ont. Div. Ct), which held that the Tribunal may determine entitlement to a medical benefit despite it not being payable on the basis it has not yet been incurred. In the same vein, since the Tribunal has the jurisdiction to determine the applicant's entitlement to NEBs without them being payable until he reaches age 18, his entitlement is not predicated on the 104 week qualifying period being the time before his 18th birthday.

[42] The respondent submits that the *Schedule* requires minor applicants to apply for NEBs once they reach age 18. However, there is nothing in the procedures for claiming benefits in Part VIII of the *Schedule* that allows for a deferral of notice of the claim or submission of an OCF-3 for minors.

[43] For all of these reasons, I agree with the reasoning in *Zhang v. Dominion of Canada General Insurance Company (Travelers)*, 2022 CanLII 93714 (ON LAT), which adopted the applicant's interpretation of s.12 of the *Schedule.* Accordingly I find that, given the respondent's agreement that the applicant suffered a complete inability to carry on a normal life in the 104 week period following the accident, he is entitled to NEBs up to September 20, 2021.

[44] This leaves the issue of what are the insurer's obligations with respect to the payment of the non-earner benefit. It means a deferral of payment if and until the applicant reaches the age of 18.

ORDER

[45] The applicant shall only be identified by the initials DC and his year of birth or age.

[46] The applicant's name, address, month and day of birth, and his foster parents' names shall be redacted from the Tribunal's adjudication file.

[47] The applicant is entitled to NEBs up to September 20, 2021.

[48] The applicant's claim for interest and a Reg.664 award is dismissed.

Released: August 3, 2023

Deborah Neilson
Adjudicator