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

Citation: E.P. vs. The Sovereign General Insurance Company, 2018 ONLAT: 17-004529/AABS

Date: November 6, 2018
File Number: 17-004529/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:

E.P.

Applicant

and

The Sovereign General Insurance Company

Respondent

DECISION AND ORDER

PANEL: Susan Mather, Adjudicator

APPEARANCES:

For the Applicant: E.P., Applicant
Michael Rotondo, counsel

For the Respondent: Terri Sullivan, representative
Shirline Apiou, counsel

HEARING HEARD: **In Person: September 24, 2018**

In Writing: October 1, 2018

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant was involved in an automobile accident on January 16, 2015, 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, The Sovereign General Insurance Company ("Sovereign"), and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The applicant signed settlement documents, including a full and final release and a settlement disclosure notice, during an in-person case conference on July 18, 2018. However, on the evening of July 20, 2018 she gave written notice to Sovereign that she was rescinding the settlement, by sending both an e-mail and fax transmission, through her counsel, to Sovereign's counsel.

[3] Sovereign brought a motion asking the Tribunal to declare the settlement agreement binding. Sovereign's argument is that the applicant did not rescind the settlement within two business days as permitted under O. Reg. 664.[1]

[4] On August 10, 2018, the Tribunal ordered that this preliminary issue hearing ("Hearing") be held to determine if the settlement is binding. [2] While Sovereign is the party seeking relief in this Hearing, I refer to Sovereign as the respondent and E.P. as the applicant throughout this decision.

[5] For the reasons provided below, I find that the applicant rescinded the settlement and, thus, may proceed to a hearing to determine her entitlement to the benefits claimed in her application.

PRELIMINARY ISSUES – IN- PERSON PORTION OF THE HEARING

[6] The Tribunal's August 10, 2018 order provides for this Hearing to be a combination hearing, and restricts the in-person portion to cross-examinations of the affiants of the affidavits that the parties agreed to file as part of their evidence. The order also sets out the dates for the exchange of written evidence and submissions for the written portion of the Hearing.

[1] O. Reg. 664, made under the *Insurance Act*, R.S.O. 1990, C. I.8.
[2] Order of Adjudicator C. Paluch issued August 10, 2018.

[7] At the opening of the hearing, the applicant asked me to exclude the supplemental affidavit of Terri Sullivan, which Sovereign served with its reply submissions. Sovereign also requested permission to call Dr. McQuillan, the applicant's nephrologist, to give oral testimony. The applicant argued that, in order to obtain such relief, the respondent should be required to bring a motion to vary the Tribunal's August 10, 2018 order.

[8] I allowed the supplemental affidavit of Terri Sullivan into evidence being satisfied that it would be a denial of natural justice and procedural fairness to not allow Sovereign to file affidavit evidence in response to the applicant's own affidavit. The applicant was not prejudiced by this decision because Sovereign served the affidavit with its reply submissions, and she had the opportunity to cross-examine Ms. Sullivan on both of her affidavits.

[9] Moreover, I disagree with the applicant that a motion on notice to vary the Tribunal's August 10, 2018 order was required. While the Tribunal's order does not specifically allow a reply/supplemental affidavit to be filed, it nonetheless provides that the hearing adjudicator will have the final decision-making authority with respect to the documents to be considered as evidence in the hearing.

[10] Based on that authority, I allowed Sovereign to call Dr. McQuillan to give reply evidence, if required, on condition that he be available to testify on the day of the in-person portion of the Hearing so as not to prolong the Hearing. I was satisfied it would be a denial natural justice or procedural fairness if Sovereign were not allowed to call evidence with respect to the applicant's dialysis. In her affidavit, the applicant relies on her treatment regime as a reason she was unable to provide instructions to her counsel to rescind the settlement before 5:00 p.m. on July 20, 2018. The Tribunal's August 10, 2018 order leaves the final decisions on evidence and format of the hearing to the hearing adjudicator.

FINAL SUBMISSIONS – ISSUES RAISED BY THE APPLICANT

[11] The Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016) (the "Rules") allow an adjudicator to make orders with respect to document disclosure. Rule 9.4 provides that, if a party fails to comply with any of the Tribunal's Rules, directions or orders concerning a document, that party may not rely on the document without the Tribunal's consent.

[12] At the conclusion of the in-person portion of the Hearing, I issued an order which adjourned the written portion of the Hearing to October 1, 2018 and

provided for final written submissions to be delivered in writing.[3] My order limited the final written submissions to five pages exclusive of the cover page, and required the submissions to be double-spaced with a 12-point font. The order also provided that no additional or new evidence or case law could be submitted.

[13] The parties agreed on the terms of the order, specifically requesting that their submissions be due on the same date, as they did not want to delay the Hearing's completion with staggered filings.

[14] Despite my order, Sovereign's submissions were a total of nine pages, comprised of five and one-half pages of single-spaced written submissions followed by three pages of footnotes. Sovereign also filed an "Index to Final Submissions of Insurer" (the "Index") containing copies of the documents to which it referred in its submissions.

[15] The applicant objects to the length and spacing of Sovereign's submissions, as well as to the admission into evidence of three of the documents included in the Index. She asks me to rule on their admissibility before proceeding with the written portion of the Hearing.

[16] While I agree with the applicant that Sovereign's submissions do not strictly meet the requirements of my Order, I will consider them in their entirety except for the documents found at Tabs 3, 4 and 5 of the Index and those paragraphs or portions thereof which refer to these documents. I do not consent to these documents being admitted into evidence. The reasons for my decision are below.

[17] The bulk of the pages that exceed the page limit are simply footnotes identifying the sources of the evidence referred to in the final written submissions. In short, they make it easier for me to locate the evidence being relied upon.

[18] While parties are expected to abide by the page limits, font size and spacing requirements, I will make an exception in this case because the submissions exceed the page limit by less than one page and the footnotes are a helpful tool for the reader.

[3] Order of Adjudicator S. Mather dated September 24, 2018, released on September 27, 2018.

[19] However, I find the documents found at Tabs 3, 4 and 5 to be new evidence which is not permitted by the Tribunal's August 10, 2018 order without my consent or by my own order adjourning the written portion of this Hearing.

[20] Sovereign argues that the documents found at Tabs 3, 4 and 5 are not new evidence because these documents are all contained in materials that were previously filed with the Tribunal. While that may be, these documents are new evidence for this Hearing because they do not meet the requirements of the Tribunal's August 10, 2018 order. They were not re-submitted for the purpose of this Hearing within the timelines set out in the order and they are not marked as exhibits to any of the affidavits filed for this Hearing.

[21] I have a responsibility to facilitate a fair, open and accessible process to ensure an efficient proportional and timely resolution of the merits.[4] Allowing these documents into evidence would require me to re-open the hearing to provide the applicant the opportunity to respond to them. I am of the view that re-opening the Hearing in these circumstances will not ensure an efficient, proportional and timely resolution of the issue to be decided in this Hearing. Sovereign had the opportunity to include these documents in its initial submissions or reply submissions. They are not documents that have recently been discovered.

[22] Having refused to consider new evidence, I do not have to determine if the document at Tab 5 is subject to solicitor-client privilege.

PRELIMINARY ISSUE HEARING

ISSUE: Is the purported settlement agreeing binding or valid in accordance with O. Reg. 664?

Settlements and O. Reg. 664

[23] O. Reg. 664 defines a settlement as an agreement between an insurer and insured person that finally disposes of a claim or dispute in respect of the insured's person's entitlement to one or more benefits under the *Schedule*: s. 9.1.

[24] O. Reg. 664 requires that an insurer must give an insured a written disclosure notice, signed by the insurer, with respect to the settlement and sets out the requirements for a disclosure notice to be valid and binding.

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[4] Rule 3.1, LAT Rules.

[25] However, O. Reg. 664 also allows an insured person to rescind a settlement "within two business days after the later of the day the insured person signs the disclosure notice and the day the insured person signs the release:" s. 9.1(4).

[26] An insured person may also rescind a settlement after two business days if the insurer has not complied with subsection 9.1(2) or 9.1(3), which set out the requirements for the disclosure notice.

[27] In this case, on Friday July 20, 2018 the applicant's counsel sent both an e-mail and fax after 7:00 p.m. to Sovereign's counsel, purporting to rescind the applicant's settlement. Sovereign takes the position that a business day for the purposes of s. 9.1(4) ends at 5:00 p.m. and, thus, that the applicant's right to rescind the settlement expired at 5:00 p.m. on July 20, 2018.

[28] The applicant argues that she had until midnight on July 20th to rescind the agreement.

[29] In the alternative, the applicant argues that she was physically incapable of instructing her lawyer to rescind the agreement until after 5:30 p.m. on July 20, 2018 because she was receiving dialysis that afternoon and had no access to a telephone until her dialysis was finished.

[30] In the further alternative, she argues that the disclosure agreement does not meet the requirements of subsection 9.1 (2) and 9.1(3), and she is entitled to rescind the settlement at any time.

Did the applicant rescind the settlement within the two business days allowed by the *O. Reg. 664?*

[31] I will first address the question of whether the applicant rescinded the settlement within the two business days as allowed by O. Reg. 664. As mentioned above, the issue I must decide what is meant by "business day" in s. 9.1(4) of O. Reg. 664.

[32] A business day is not defined in the O. Reg. 664. It is, however, defined in the *Schedule* and in the Rules. Sovereign argues that regulations made under the *Insurance* Act with respect to statutory automobile benefits – specifically the *Schedule* and O. Reg. 664 – form an integrated scheme. For that reason, it argues that the definition of business day found in the *Schedule* and the time limits imposed on a business day in the *Schedule* are applicable in determining if the applicant rescinded the settlement within two business days.

[33] To support its argument that a business day is from 9:00 a.m. to 5:00 p.m., Sovereign refers to the Tribunal's website, which state that the hours of operation of the Tribunal are 8:30 a.m. to 5:00 p.m. Sovereign also relies on s. 64(25)[5] of the Schedule and those provisions in the *Schedule*[6] and the Rules[7] for the timing of delivery of documents in writing. These provisions set a 5:00 p.m. ending to the business day.

[34] The applicant argues that the term "business day" in O. Reg. 664 does not in fact mean "business hours," and asks me to find that a business day for the purpose of O. Reg. 664 ends at midnight.

[35] The applicant argues that the provisions in the Rules with respect to the timing of the delivery of documents do not apply to the rescission period in the O. Reg. 664 since the Rules are not regulations and, in any conflict between the Rules and a legislated Act or Regulation, legislation prevails. The Rules are made under the *Statutory Powers Procedure Act* and the *Licence Appeal Tribunal Act*[8] and are practice and procedural rules that govern applications to the Tribunal. I agree with the applicant that the Rules have no application to the deadline for delivery of rescission notices under O. Reg. 664.

[36] With respect to the provision in the *Schedule* for the timing of the delivery of documents, the applicant points out that the *Schedule* restricts the application of the section 64 time limits to acts required under the *Schedule*. She argues that, because the applicant's notice of rescission is not a notice required under the *Schedule*, the timing limitation is not applicable.

[37] The applicant argues that Sovereign's proposed statutory interpretation is inconsistent with the fact that there is not a single explicit reference to a settlement disclosure, a release or a notice to rescind a settlement in the entire text of the *Schedule*. The applicant argues that the legislature has chosen to explicitly address each of these three documents separately in s. 9.1 of O. Reg. 664.

[38] I prefer the applicant's statutory interpretation and find that, for the purpose of the O. Reg. 664, a business day is 24 hours and the time period for rescission of the applicant's settlement did not expire on 5:00 p.m. July 20, 2018.

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[5] S. 64(25)[5] provides that if a provision of the *Schedule* requires a person to do anything within a time period expressed in days or business days the time period is deemed to expire at 5:00 p.m. local time.
[6] S. 64(20) O. Reg. 34/10.
[7] Rule 6.2, The Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016).
[8] *Licence Appeal Tribunal Act*, 1999, S.O. 1999, Chapter 12, Schedule G.

[39] I agree with Sovereign that the *Insurance Act*, the *Schedule* and O. Reg. 664 form an integrated scheme. Both of these regulations are made under *the Insurance Act*, and s. 9.1(1) of O. Reg. 664 defines a “settlement” as an agreement between and insurer and insured person that finally disposes of claim or dispute in respect of an insured’s entitlement to benefits under the *Schedule.*

[40] The Schedule defines “business day” to mean a day that is not a Saturday or “a holiday within the meaning of section 88 of the *Legislation Act, 2006*, other than Easter Monday and Remembrance Day.” The definition does not impose any time limit for a business day: s. 3(1).

[41] In prescribing the time that an insurer or insured has to deliver certain notices or taken certain steps, the *Schedule* uses both the terms “days” and “business days,” the difference being that, if the time period is prescribed as “business days,” Saturdays and Holidays are not counted in computing the number of days an insured or insurer has to provide certain notices or taking certain actions required by the *Schedule.*

[42] The *Schedule*, however, prescribes a 5:00 p.m. time limit on both a “business day” and a “day” for the filing of documents and giving notices or doing anything within a time period expressed in days or business days in the *Schedule.* Critically, the *Schedule* also specifically provides that the 5:00 p.m. time limit only applies for the purposes the *Schedule.*

[43] I am of the view that, if it was intended that a business day ends sharply at 5:00 p.m. for the purpose of O. Reg. 664, the regulation would have included this same specificity. The fact that the *Schedule* was drafted to provide the same 5:00 p.m. time limit for both “days” and “business days” as contemplated only under the *Schedule* supports my finding that ,without a prescribed time limit, both days and business days have 24 hours under O. Reg. 664.

[44] The purpose of O. Reg. 664 is to provide insureds with the opportunity to reflect on the settlement of accident benefit claims after signing a release and settlement disclosure notice and to allow them the opportunity to change their minds. While I agree with Sovereign that there has to be a balance between the need to allow an insured the opportunity for second thought and the need to encourage settlement by ensuring enforceability, I am not persuaded that imposing a deadline of 5:00 p.m. on the applicant rather than a midnight deadline disturbs that balance.

[45] Strict requirements are prescribed for a settlement disclosure notice to be valid which do not include the requirement that written notice to rescind a settlement must be delivered to the insurer or its representative's office by 5:00 p.m. on the second business day.

[46] I find no merit in Sovereign's argument that the applicant's counsel acknowledged that the rescission was late in his letter dated July 24, 2018,[9] in which he states that he provided written notice to rescind the settlement agreement just hours "after the close of the business day." I accept the applicant's submission that her counsel was replying to the July 23, 2018 letter of counsel for Sovereign which acknowledges the receipt of the fax and e-mail received "after business hours."

[47] I have not been provided with any case law to convince me that my interpretation of O. Reg. 664 is wrong.

[48] The applicant submits the case of *Goldstein et al. v. Grant*[10] ("*Goldstein")* in which the Ontario Court of Appeal defined the term "business day" in the absence of a contractual definition to begin and end at midnight. Sovereign argues that this case is not applicable because it is not an automobile insurance case. While it is not an automobile insurance case, I find this Court of Appeal decision supports my interpretation of O. Reg. 664.

[49] The legislature has not defined the hours in a business day for the purpose of O. Reg. 664 and, in absence of a definition, according to the Court of Appeal, a business day starts and ends at midnight. Justice Houlden states in his reasons for the decision that "*strictly construed a day is a period of time which begins with one midnight and ends with the next.*" Applying this definition to the facts of this case there is no doubt that the rescission notice was delivered within two business days.

[50] I also note that both Justices Houlden and Arnup were of the view that the 48 hour time period at issue began to run at the end of the first business day. Applying their reasoning to the facts of this case would allow the applicant until midnight on July 23rd to deliver a notice to rescind the settlement because July 21st and July 22nd were not "business days".

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[9] Exhibit O, affidavit to Terri Sullivan sworn July 28, 2018.
[10] 1978 CanLII 1476 (ONCA).

[51] Sovereign submits that the case of *Parveen v. Aviva Canada Inc.*[11] ("*Parveen*") supports it position. Although *Parveen* was decided on a different basis, the Court considered an alternative argument raised by the applicant that she rescinded her settlement agreement within two business days.

[52] The decision in *Parveen* does not provide any guidance to me because the arbitrator in *Parveen* was not required to consider whether a notice of rescission delivered after 5:00 on the second business day is delivered too late to rescind a settlement.

[53] In any event, I am not bound by a decision of a FSCO adjudicator.

[54] *Sovereign* also submits FSCO's decision in *Mousavi and ING Canada*.[12] In *Mousavi*, the issue was whether Saturday was a business day for the purpose of computing days. The arbitrator states that, given that O. Reg. 664 contemplates an insured serving notice on the insurer, it would hardly make sense for a notice served on a Saturday to a closed office to be considered to be effective service.

[55] I do not find this case to be applicable to the facts before me because the arbitrator was dealing with the issue of computation of business days. The arbitrator did not address the question of when a business day ends except to comment that it did not make sense to count a day that a business is not open for regular hours as a business day.

[56] Sovereign argues that *Mousavi* is persuasive in the circumstances because by the applicant not providing her notice to rescind until after the close of the business on July 20, 2018, Sovereign did not become aware of the notice to rescind until Monday July 23, 2018.

[57] The requirement in s. 9.1(7) of O. Reg. 664 to rescind a settlement is simply that written notice be delivered to the office of the insurer or its representative. It does not require that the notice be delivered while the office is open for business and does not require personal service of the written notice. Sovereign acknowledges that the notice was received by its counsel on July 20, 2018.

[58] I am not aware of any actions that Sovereign would have taken in response to the rescission notice if had been delivered by 5:00 p.m. rather than after 7:00

[11] 2012 CarswellOnt 5169.
[12] 2008 CarswellOnt 5532; 2008-2009 FSCO 2278.

p.m. I am unable to see that there is any prejudice to Sovereign or any other Insurer if the deadline is 12:00 midnight.

[59] Having determined that the applicant's settlement was rescinded on July 20, 2018 there is no need for me to consider if the settlement disclosure agreement meets the requirements of O. Reg. 664.

ORDER

[60] For the reasons provided above I order:

(1) The applicant's settlement with the Sovereign is rescinded.

(2) The applicant may proceed to a hearing to determine her entitlement to the benefits she has claimed in her application.

(3) The application is adjourned to a Case Conference to be arranged by the Tribunal within 30 days of the date of release of this Order.

(4) The purpose of the Case Conference is to schedule a date(s) for a hearing on the merits of the applicant's claim for benefits in consultation with the parties and to confirm the issues, witnesses and format for the hearing.

Released: November 6, 2018

Susan Mather
Adjudicator