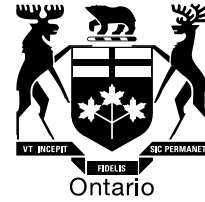


# LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards  
Tribunals Ontario



Date: **January 27, 2017**  
Tribunal File Number: **16-000284/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:

**P. B.**

**Applicant**

and

**RBC Insurance Company**

**Respondent**

## DECISION

**Adjudicator: Chris Sewrattan**

**Appearances:**

**Counsel for the Applicant: David Carranza**  
**Counsel for the Respondent: Lianne Sharvit,**

**HEARD: Written Hearing: November 7, 2016**

## REASONS FOR DECISION AND ORDER

### Overview

[1] On August 17, 2016 the applicant was injured in a motor vehicle accident. He applied for accident benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”). RBC General Insurance Company (“RBC”) denied payment for part of an income replacement benefit. The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for payment in relation to the income replacement benefit.

### Issues in Dispute:

[2] The following issues are in dispute before the Tribunal:

- (1) Is the applicant entitled to \$268.50 for an accounting report by McCully & Associates? The full amount remaining in dispute is the Harmonized Sales Tax (“HST”) paid by the Applicant on the fee for the report.
- (2) Is the applicant entitled to interest on outstanding benefits?
- (3) Is the applicant entitled to costs under Rule 19 of the *License Appeal Tribunal Rules of Practice and Procedure*?
- (4) Is RBC entitled to costs under Rule 19 of the *License Appeal Tribunal Rules of Practice and Procedure* (the “Rules”)?

### Result:

[3] The applicant is not entitled to \$268.50 in HST for the accounting report, interest on outstanding benefits, or costs. RBC is not entitled to costs.

**Discussion:**HST for the accounting report

- [4] The applicant applied for and received an income replacement benefit from RBC. Applying for the benefit, the applicant commissioned an accounting report from McCully & Associates. The report cost \$2,768.50 including HST. The applicant seeks reimbursement from RBC for this amount. However, section 7(5) of the *Schedule* caps the amount an insurer is required to pay for such a report at \$2,500. RBC paid the \$2,500.00 and the remaining \$268.50 is in dispute.
- [5] The legal issue before the Tribunal is whether \$2,500 cap under s. 7(5) of the *Schedule* includes HST. If it does, RBC has paid the applicant all he is entitled. If it does not, the applicant is owed \$268.50.
- [6] The applicant's submission on this issue provides no direction on how to approach the legal analysis. The applicant's written submissions provide a timeline of events describing, roughly, his application for an income replacement benefit. Attached to the submissions is the decision of *Kennedy v. Traders General Insurance Company*, FSCO A02-001715 (*Kennedy*). Presumably, the applicant asks me to deduce the argument made in *Kennedy* and apply it to the applicant's circumstances, deciding in his favour.
- [7] In *Kennedy*, the Financial Services Commission of Ontario ("FSCO") Arbitrator considered the issue of whether a statutory cap on the cost of a report includes the General Sales Tax (GST). It is unclear whether the report in question in *Kennedy* was an accountant's report. The FSCO Arbitrator held at page 3 of the

decision that “there is no obvious answer to this issue, however if the legislature had intended that they be inclusive of GST, it would have been easy enough to make that explicit.” If this reasoning is applied to the applicant’s circumstance, it would suggest that the \$2,500 cap under s. 7(5) does not include HST.

- [8] In response, RBC submits that if the Legislature intended for taxes to be excluded in the prescribed cap on an expense, it would have explicitly stated this in the statute. RBC provides the *Expense Regulation* for expenses related to arbitration hearings. The regulation states: “Any applicable taxes paid in respect of expenses referred to in this section” may be awarded as a disbursement. RBC provides *Clipperton v. Zurich Insurance Co.*, 2002 CarswellOnt 5275 (*Clipperton*). In that case, a FSCO Arbitrator held that where the maximum for a prescribed amount in the *Dispute Resolution Expense Schedule (DRES)* is met, there is no further payable amount for taxes. The difficulty with *Clipperton* is that it is specific to the *DRES*. It would be unsound to apply principles arising out of that statutory scheme to an interpretation of the *Schedule*.
- [9] The resolution of this issue turns on the onus. The applicant bears the onus of proving his entitlement to a benefit on a balance of probabilities. There are two elements to this burden, evidentiary and persuasive. The applicant must provide enough evidence to support a finding of his entitlement to the requested benefit. The applicant must also marshal that evidence in a manner that persuades the adjudicator of his entitlement on a balance of probabilities.
- [10] The applicant has provided a single case as its principal submission, which I find unpersuasive: *Kennedy* is dated, not binding, and addresses a different statutory

provision. The Arbitrator's decision in *Kennedy* contains very little analysis that could guide me in my decision in the applicant's case. To be fair to the Arbitrator, I do not believe that was their objective when they wrote the decision. Nevertheless, with a lack of supplemental submissions, *Kennedy* is insufficient to persuade me on a balance of probabilities that the HST is owing to the applicant.

[11] To be clear, my decision is affected by both the material and argument of the applicant. There is insufficient material to support the applicant's argument, and the argument itself is too limited to persuade me on that the cap under s. 7(5) includes tax.

[12] The Applicant's claim for HST is dismissed.

#### Interest on outstanding benefits

[13] Two issues related to interest arise on the submissions. Only the first issue was thoroughly discussed by the parties.

[14] The first issue relates to interest on payment for the income replacement benefit. Two case conferences were held in respect of this matter. The amount of the income replacement benefits was in dispute through this time. Between the first case conference and the final Order for this hearing, the applicant and RBC settled broader issues related to payment of the income replacement benefit. RBC paid the applicant a sum of money constituting the income replacement benefit for the period between August 25, 2015 and October 30, 2016. RBC has agreed to pay the applicant \$400.00 per week on an ongoing basis after October 30, 2016.

[15] The parties remain in disagreement about whether interest is owed on payments of the benefit that were outstanding prior to the first case conference.

[16] The applicant submits that interest is payable because the income replacement benefit was at one time an outstanding benefit. The applicant's written submissions were provided on September 29, 2016. This was before the parties agreed to settle the substantive issue of the income replacement benefit. The applicant's written submissions sought an income replacement benefit from March 13, 2016 to date and ongoing. As a result, I presume that the applicant is seeking interest from March 23, 2016 to the date the parties settled the income replacement benefit issue, which is sometime in November 2016. The applicant did not provide submissions on this narrow issue.

[17] RBC submits that interest is not owed during this time period because of s. 33(8) of the *Schedule*. To understand this submission, some explanation of the timeline regarding payment of the income replacement benefit is required. All of the following dates are in 2016.

- February 5: RBC received a report from McCully & Associates dated January 29 providing calculations for the applicant's income replacement benefit for the period of August 24, 2015 to January 26, 2016
- **February 18: RBC's accounting firm wrote to the applicant's counsel requesting information required to commence their own calculations on the applicant's income replacement benefit**
- March 3: RBC's accounting firm follows up with the applicant's counsel about the February 18 request

- March 21: RBC's accounting firm follows up with the applicant's counsel about the February 18 request
- April 11: RBC's accounting firm follows up with the applicant's counsel about the February 18 request
- April 18: The applicant's counsel provides the documentation requested on February 18

[18] Under s. 33, the applicant must provide within 10 business days upon request information reasonably required to assist RBC in determining the applicant's entitlement to an income replacement benefit. The applicant failed to comply with s. 33 for roughly three months between February 18 and April 18.

[19] Under s. 33(8), once RBC received the requested information on April 18, it was required to pay the Applicant the outstanding income replacement benefit *if the applicant provided a reasonable explanation for his delay in providing the requested information*. There is no evidence that the applicant provided a reasonable explanation for his delay in providing the requested information. Nonetheless, RBC paid the applicant his income replacement benefit that was withheld during the period of the applicant's non-compliance. Under s. 33(8), payment for the income replacement benefit is not outstanding unless and until the applicant provides a reasonable explanation for his delay in providing the requested information. The applicant has not yet provided one. Under the law, payment on the income replacement benefit is not outstanding.

[20] The claim for interest on this ground is dismissed.

[21] The second issue relates to interest on payment made by RBC as part of the pre-hearing settlement. The applicant claims interest on a \$14,836.87 payment by RBC to Physiotherapy Fix & Fitness on September 6, 2016. The claim for interest on this payment is dismissed for two reasons. First, the issue has settled privately between the parties. It is not properly before the Tribunal. Second and in the alternative, the claim lacks evidence. The applicant's submission is provided in a letter dated November 4, 2016 by his counsel. There is no evidence provided to accompany this submission. The Tribunal cannot speculate to fill in the evidentiary gaps in the applicant's submission. That would be unfair to RBC.

#### Costs for the Applicant

[22] Rule 19.1 of the *Rules* provides that costs may be requested in a proceeding where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. This requires an evidentiary record and submissions persuasive on a balance of probabilities. The Applicant seeks from RBC the cost of bringing the application to the Tribunal to resolve the issues in dispute. His position is that RBC was so incorrect to dispute his claims that it was unreasonable to require him to bring this Application to the Tribunal.

[23] The applicant's claim is dismissed. Rule 19.1 only allows for costs where the impugned party's conduct occurs *in a proceeding* before the Tribunal. Assuming RBC's conduct is properly impugned, which is itself doubtful, it arose prior to the Tribunal's proceeding.



### Costs for RBC

- [24] RBC claims for costs on three grounds. First, RBC submits that the Applicant's failure to provide requested information caused the issue of income replacement benefits to become in dispute. This ground is dismissed because the income replacement benefit issue raised a novel legal issue about HST and s. 7(5) of the *Schedule*.
- [25] Second, the applicant raised outstanding interest as an issue in dispute in his reply submissions. This ground is dismissed because the Tribunal's August 30, 2016 Order for a written hearing lists as an issue in dispute "interest on payment of outstanding benefits". This includes interest on the income replacement benefit. The applicant's failure to address this issue in his initial written submissions is less than ideal. However, his conduct does not rise to the level of unreasonable, frivolous, vexatious, or in bad faith.
- [26] Third, RBC submits that the applicant unreasonably seeks interest for the income replacement benefit when the reason the interest is denied is his own failure to provide a reasonable explanation for why he delayed in providing requested information. While I appreciate RBC's frustration, its inconvenience in defending an issue in dispute properly brought before the Tribunal, however weak, does not make the applicant's conduct unreasonable under *Rule* 19.1. Cost awards under Rule 19 are to maintain civility and order during proceedings, to deter conduct that threatens the orderly and civil resolution of an application, and to ensure that the Tribunal's process and the other participants are respected. They are not to compensate parties for the cost of bringing or defending claims, or to punish.

**Conclusion:**

[27] The Applicant is not entitled to:

- \$268.50 in HST for the accounting report,
- interest on outstanding benefit, or
- costs.

[28] RBC is not entitled to costs.

**Released:** January 27, 2017

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**Chris Sewrattan,**  
Adjudicator