

**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**

**Tribunal File Number: 19-001820/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:

**Economical Mutual Insurance Company**

**Applicant**

and

**A.S.**

**Respondent**

**PRELIMINARY ISSUE DECISION**

**ADJUDICATOR:**

**Jesse A. Boyce**

**APPEARANCES**

Counsel for the Applicant:

Jason R. Frost

Counsel for the Respondent:

Samia M. Alam

**Written Hearing on:**

**February 20, 2020**

## OVERVIEW

- [1] A.S. was injured in a motor vehicle accident on May 5, 2014 and sought benefits from Economical,<sup>1</sup> pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*<sup>2</sup> (the “Schedule”).
- [2] Economical paid income replacement benefits (“IRB”) to A.S. following the accident. In addition, A.S. submitted a Determination for Catastrophic Impairment (“OCF-19”) on April 10, 2017. Following the completion of s. 44 insurer’s examination for catastrophic impairment, Economical disputed A.S.’s claim that he was catastrophically impaired (“CAT”) and denied that claim via an Explanation of Benefits dated November 11, 2017.
- [3] In the fall of 2018, A.S. produced his CPP disability file pursuant to a s. 33 request. Economical requested repayment of overpaid IRBs in the amount of \$6,770.29. Economical suspended A.S.’s IRBs in accordance with s. 33. To date, A.S. has not submitted repayment.
- [4] On February 8, 2019, Economical commenced an application at the Tribunal seeking repayment of the IRB for the period November 28, 2017 to December 1, 2018, an order regarding ongoing entitlement to IRBs and a determination of CAT. At the case conference, A.S. raised two preliminary issues giving rise to this written hearing.

## PRELIMINARY ISSUES

- [5] The revised Case Conference Order, dated September 19, 2019, outlined the following issues as being in dispute:
  - i. Whether the insurer can bring a LAT application to determine an insured person’s entitlement to IRBs?
  - ii. Whether the insurer can bring a LAT application to determine whether the insured has sustained a catastrophic impairment?

## RESULT

- [6] I find that an insurer cannot bring a LAT application to determine an insured person’s entitlement to IRBs or an application to determine whether an insured person has sustained a catastrophic impairment.

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<sup>1</sup> The OCF-1 application was originally submitted to Wawanesa, with Economical later taking priority.

<sup>2</sup> O. Reg. 34/10, as amended.

- [7] However, an insurer may bring an application seeking repayment of IRBs. Economical's application on this issue may proceed to the Tribunal.

## ANALYSIS

- [8] The parties' positions on the preliminary issues are relatively straightforward, despite the procedural irregularities that underpin their dispute. A.S. submits that since he never applied to the Tribunal, the Tribunal does not have jurisdiction under s. 280 of the *Insurance Act* because there is no dispute or disagreement over his entitlement to or Economical's denial of his IRB or catastrophic determination. Specifically, A.S. submits that Economical does not have the right to bring an application for determination of IRB entitlement or its own denial of CAT because a dispute only arises under s. 280 when an insured disagrees with an insurer's determination or denial and applies to the Tribunal.
- [9] In response, Economical submits that under s. 280(2) an insurer has the right to commence a LAT Application to determine disputed entitlement to specified benefits or CAT, and argues there are several examples of situations where an insurer was the applicant at the Tribunal.
- [10] I agree with A.S. I find he has not disputed Economical's determinations. Where there is no dispute, the Tribunal has no function. But first, a brief detour through the relevant statutory provisions and jurisprudence.

### *A brief detour*

- [11] Section 280 is conveniently titled "Resolution of disputes," with subsection (1) stating that the section applies: "with respect to the resolution of disputes in respect of 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." Subsection (2) states that: "The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1)." [emphasis mine].
- [12] Both parties cite paragraphs 41-45 of the Court of Appeal case *Stengenga v. Economical, 2019 ONCA 615* as support for the Tribunal's scope of jurisdiction, which the parties agree is wide. Their respective interpretations of these paragraphs differ, but the take away here is paragraph 45, which states:

Taken together, the words of s. 280(1) cover a wide array of disagreements connected in some way to the SABs to which an insured person was or is entitled. Viewed in the context of the

purpose and history of the dispute resolution provisions, those words include disagreements about when the insurer's obligation to provide SABs should be or should have been performed, and how the obligation to provide them should be or should have been performed.

- [13] Taken together, s. 280 and *Stengenga* inform us that either of an insured or insurer may apply to the Tribunal to resolve a wide range of disputes over entitlement to or quantum of benefits under the *Schedule*.

*No dispute = no jurisdiction*

- [14] After the detour, we arrive at our issue. A.S. argues that he has not yet disputed Economical's suspension of his IRB or its determination that he is not CAT. On the evidence, this is clearly true. Economical seems to conflate its own determinations that IRBs are no longer payable and that A.S. is not CAT with a "dispute" or a "disagreement" that triggers the Tribunal's jurisdiction and permits it to apply for resolution of the dispute. Ostensibly, Economical appears to be creating a dispute where none exists. With the exception of an IRB repayment claim—which I address below—I agree with A.S. that it is only when an insured disagrees with an insurer's determination and files an application at the Tribunal that a "dispute" under s. 280 arises.
- [15] Economical identifies nine alleged instances where an insurer has filed an application with the Tribunal as the applicant. However, I agree with A.S. that not one of these cases is applicable in this matter. Indeed, all of the examples provided by Economical—which concern issues such as whether there was an accident, whether a claim is barred under s. 61, whether an expense is incurred, whether the MIG applies, *etc.*—were raised as defences in response to an insured's application to the Tribunal for resolution of a dispute. The sole exception for when an insurer may apply as an applicant is when the insurer is requesting repayment of an IRB.
- [16] Economical also argues that A.S. "admits in his submissions that he applied for a Catastrophic Determination and claimed entitlement to IRBs" and "further admits that the Insurer has denied and disputed his entitlement to those claims" seemingly as support for its contention that s. 280(2) permits it to commence an application at the Tribunal. While I find A.S. did apply for CAT (because he submitted an OCF-19) and did claim IRB (because he was paid same) and that Economical denied both, I also find A.S. has not disputed either of these determinations. At this point, it is just as likely that A.S. agrees with Economical's determinations.

[17] In the absence of action taken by A.S. to dispute Economical's determinations by commencing an application at the Tribunal, s. 280 cannot be triggered, regardless of how broad the Tribunal's powers are. Economical cannot pre-empt A.S. by applying to the Tribunal to reinforce its own decisions. It is unclear what Economical even thinks such a process would entail.

#### CAT

[18] Economical relies on the Tribunal's decision in *17-004258 v. Aviva General Insurance*, 2018 CanLII 130845 to support its argument that the broad language of s. 280(1) gives the Tribunal jurisdiction to determine a CAT dispute. While this decision does consider whether the Tribunal can determine CAT as a stand-alone issue and grant declaratory relief, contrary to Economical's belief, it does not indicate that an insurer can bring a CAT application to the Tribunal or that an insurer's denial of CAT somehow constitutes a dispute under s. 280. Further, the applicant in that case was the insured and not the insurer. To borrow from A.S.: an OCF-19 is just an application for determination of CAT and an OCF-9 is just a denial – neither is an indication of a dispute.

#### IRB

[19] Economical seeks a determination from the Tribunal regarding A.S.'s "disputed" entitlement to IRBs since its refusal to pay due to a s. 33 suspension of benefits in December 2018. Economical submits that it has been requesting documents relevant to the IRB claim under s. 33 since March 29, 2017 and A.S. has not complied. Economical states that it is proper for an insurer to refuse to pay benefits during a period of s. 33 non-compliance and that it is "jarringly notable" that A.S. has not commenced an application for the "disputed" IRBs. Economical argues that it does not have to be "held hostage in perpetuity" by an insured and that it can, and has, applied to the Tribunal to resolve the dispute and to seek an Order that IRBs are not payable.

[20] I disagree. To begin, and again, A.S. has not yet disputed Economical's determination to suspend his IRB, despite its contention otherwise. In fact, since there is no denial, the two-year limitation period has not elapsed and does not elapse until December 2020. To allow an insurer to apply to the Tribunal for an endorsement of its decision or an enforcement of s. 33 would render the two-year limitation period meaningless. A.S. can still comply with the s. 33 requests or dispute the determination, just as Economical can still terminate the IRB and trigger the limitation period. Based on the timeline, it does not appear Economical even provided A.S. with time to comply with s. 33 before it filed this application with the Tribunal. Accordingly, it is difficult to accept how Economical

is being held hostage when the decision to suspend and not terminate IRBs was its own and no payments are being made.

*Economical may apply for repayment*

- [21] While Economical cannot bring an application to determine A.S.'s entitlement to IRBs and cannot bring an application to determine whether A.S. is CAT, the parties agree that s. 280(2) indicates Economical may bring an application to the Tribunal for repayment of the IRBs, pursuant to s. 280(1).
- [22] Indeed, the only recourse for an insurer to apply to the Tribunal as the applicant is when it is seeking repayment of specified benefits through error, fraud or misrepresentation. The "Application by an Insurance Company" Form specifically asks whether the insurer is claiming a repayment of benefits, which applies to all of IRB, non-earner, caregiver, attendant care and medical and rehabilitation benefits.
- [23] Section 52 of the *Schedule* deals with repayments to insurers. An insurer that provides proper notice may then obtain repayment in the manner described in the notice. I find on the evidence that Economical provided A.S. with proper notice of its request for repayment of IRBs following receipt of A.S.'s CPP disability determination. The letter of November 28, 2018 provides the necessary calculations, the date of suspension and, in clear language, the request for repayment of overpaid IRBs in the amount of \$6,770.29 pursuant to s. 52(2)(a). As A.S. has not repaid this amount, it follows that Economical may proceed with its application to the Tribunal for repayment.

*Costs*

- [24] In submissions, Economical sought \$1,000 in costs. It argues that it provided clear and uncontested case law to A.S. and despite this, A.S. initiated an "unreasonable, frivolous and vexatious preliminary issue motion." Economical argues that because A.S.'s position is not based upon any cogent legal authority or argument, he has caused Economical to unnecessarily incur over \$3,000 in legal costs. For the reasons above, I disagree. A.S. raised a perfectly valid and, in my view, correct preliminary issue in response to an improper application filed by Economical. I find costs are not appropriate.

## CONCLUSION

- [25] Economical cannot bring a LAT application to determine A.S.'s entitlement to IRBs or an application to determine whether A.S. is CAT as there is no dispute triggering jurisdiction under s. 280.
- [26] Economical may proceed with its application to the Tribunal seeking repayment of IRBs. I decline to order costs.

**Released: March 10, 2020**



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**Jesse A. Boyce**  
**Adjudicator**