



FSCO A12-000029

**BETWEEN:**

**ASTON HOWELL**

**Applicant**

**and**

**CHARTIS INSURANCE COMPANY OF CANADA**

**Insurer**

**DECISION ON A PRELIMINARY ISSUE**

**Before:** Jessica Kowalski

**Heard:** By way of written submissions received by March 12, 2014

**Appearances:** Kevin Marshall for Mr. Howell  
Jason Frost for Chartis Insurance Company of Canada

**Issue:**

Should Mr. Howell's claim for income replacement benefits be dismissed?

**Result:**

Mr. Howell's claim for income replacement benefits arising from the October 1, 2009 accident is dismissed.

## **Background**

Mr. Howell was involved in an automobile accident on October 1, 2009. He applied for statutory accident benefits from Chartis Insurance Company of Canada (“Chartis”), including weekly income replacement benefits in the amount of \$362.05 per week from October 8, 2009 to date and ongoing.

Chartis seeks an order dismissing Mr. Howell’s claim for income replacement benefits (“IRBs”) on the basis that it is statute barred, frivolous, vexatious and an abuse of process.

## **Insurer’s Position**

Chartis submits that the IRB claim is without merit because Mr. Howell:

- i. has not properly applied for income replacement benefits;
- ii. irrevocably withdrew any claim for income replacement benefits;
- iii. is non-compliant with the section 33 requirements for documentation to verify and determine potential entitlement to income replacement benefits;
- iv. has stated under oath that he has not filed an income tax return in years and does not believe in filing tax returns;
- v. misrepresented his pre-accident employment and income.

Chartis also claims that Mr. Howell does not suffer a substantial inability to perform the essential tasks of his pre-accident employment as a direct result of the accident and is barred from mediating or arbitrating the claim for income replacement benefits.

## **Applicant's Position**

Mr. Howell submits that since Mr. Marshall's recent retainer there has been regular communication with Chartis to furnish outstanding documents and information.<sup>1</sup> He submits that the withdrawal of his income replacement benefits claim did not represent his true intentions, or that he did not understand that the claim was being withdrawn. He submits that his failure to declare income is owed in large part to efforts by his pre-accident employer to avoid financial scrutiny and pay taxes. He claims for the first time now that he may have been an independent contractor rather than an employee for his purported pre-accident employer, Julia's Fine Cuisine. He pledges to file his income tax returns forthwith (or to a date set by this tribunal) so that the claim for IRBs can then be determined on its merits in view of two favourable disability certificates completed after the accident.<sup>2</sup>

## **ANALYSIS:**

Section 23(1) of the *Statutory Powers Procedure Act* states that a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

I find that Mr. Howell's failure to file any documents to support an IRB claim, his failure to clarify defects in his application for benefits and employment information, his failure to attend any insurer examination for the purpose of assessing work-related disability, together with his attempt to arbitrate a claim he purported to withdraw, have irrevocably prejudiced Chartis' ability to assess him and to adjust and defend the IRB claim. I find that Mr. Howell's conduct as

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<sup>1</sup>In or around February 2014. Mr. Howell has had at least four lawyers, including, most recently, Mr. Marshall. There are claims in addition to IRBs that remain in dispute and are scheduled to be heard in September 2014. This decision addresses only with the IRB claim.

<sup>2</sup>Dr. Dean Antoniazzi concluded in a first Disability Certificate on November 13, 2009 that Mr. Howell could not work for 9-12 weeks and a second one on May 3, 2010 that Mr. Howell would need an additional 9-12 weeks before returning to work.

a whole throughout the life of the IRB claim constitutes an abuse of process such that the IRB claim should be dismissed.

I disagree with Chartis' submission that the IRB claim is completely barred by operation of section 64.1, now s.4(5), of the *Schedule*,<sup>3</sup> which deals with unreported income. Section 64.1, now s.4(5), require income to be reported to the CRA in order for IRBs to be payable; any income that has not been reported does not form part of the calculation of an income replacement benefit.<sup>4</sup>

The remedy for an IRB claim where there is undeclared income is simply that the insurer is not required to consider that income in any calculation of an IRB. In this case, where all of the income on which the claim is based is zero because none has been reported, then the amount that Chartis is required to pay is zero.

Mr. Howell has to date not reported his income. He knew from the outset of his claim that the insurer was requesting proof of income. His recent pledge notwithstanding, and despite Mr. Marshall's commendable efforts during his brief retainer, I find that Mr. Howell's conduct so far belies any genuine intention to file returns and to rehabilitate the IRB claim.

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<sup>3</sup> Effective September 1, 2010, the *Statutory Accident Benefits Schedule — Effective September 1, 2010* (the "New Regulation") came into force. The transition rules in the *New Regulation* provide that, subject to certain exceptions, benefits that would have been available pursuant to the *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996* (the "Old Regulation") shall be paid under the *New Regulation*, but in amounts determined under the *Old Regulation*. As a result, both the *Old Regulation* and the *New Regulation* are applicable to accidents that occurred on or after November 1, 1996 and before September 1, 2010.

<sup>4</sup>S.64.1(1) of the *Old Regulation* reads: "If, under the *Income Tax Act* (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income, a person is required to report the amount of his or her income, the person's income before an accident that occurs after April 14, 2004 shall be determined for the purposes of this Regulation without reference to any income the person has failed to report contrary to that Act or legislation."

S.4(5) of the *New Regulation* reads almost identically: "If, under the *Income Tax Act* (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income, a person is required to report the amount of his or her income, the person's income before an accident shall be determined for the purposes of this Part without reference to any income the person has failed to report contrary to that Act or legislation."

It is undisputed that Mr. Howell was paid in cash. It is undisputed that he signed his own Employer's Confirmation Form (OCF-2), claiming to have been employed before the accident at Julia's Fine Cuisine as a manager/supervisor/cook. According to that OCF-2, Mr. Howell's gross weekly earnings were \$560, totaling \$30,000 gross, in the 52 weeks before the accident.<sup>5</sup>

It is undisputed that, according to a November 29, 2009 Explanation of Benefits Form (OCF-9) that Chartis sent to Mr. Howell, the information received from the employer contradicted Mr. Howell's OCF-2. According to the OCF-9, Julia's Fine Cuisine told Chartis that Mr. Howell worked 20-30 hours per week, depending on business.<sup>6</sup> Further, the OCF-2 made no reference to Atlantis Cooling, where Mr. Howell claimed, in a December 15, 2009 statement to Chartis' adjuster and during his June 29, 2010 examination under oath, that he also worked part time. No proof of income from or records relating to Mr. Howell's employment at Atlantis Cooling have been produced.

It is also undisputed that Mr. Howell gave evidence without reservation during his examination under oath that he has not filed income tax returns since 2008 (the period from which Chartis has requested production, that is, one year pre-accident), did not believe in filing income tax returns, and feels he owes the government nothing.<sup>7</sup>

Moreover, Mr. Howell stated during his examination under oath on June 29, 2010 that "I don't have paper to file any tax returns."<sup>8</sup> As set out above, Mr. Howell has known since 2009 that Chartis was taking the position that it required his proof of income in order to address entitlement and calculate a potential income replacement benefit. Even the spectre of a preliminary issue hearing that could result in the dismissal of his income replacement benefit

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<sup>5</sup>52 weeks x \$560 = \$29,120.00

<sup>6</sup>\$560.00 in gross income per week (as set out in the OCF-2) earning \$15/hour totals a 37.8 hour work week. Mr. Howell's employer allegedly stated in a telephone call to Chartis' adjuster that he worked 20-30 hours per week, depending on business. 20 hours per week x \$15/hour = \$300. 30 hours per week x \$15/hour = \$450. Even when the 20 additional hours allegedly worked at Atlantis Cooling are added, the numbers do not add up to Mr. Howell's representations in his OCF-2.

<sup>7</sup>From the transcript of Mr. Howell's examination under oath on June 29, 2010 at pages 41 and 43.

<sup>8</sup>From the transcript of Mr. Howell's examination under oath on June 29, 2010 at page 41.

claim was not enough of a catalyst to prompt Mr. Howell to take any steps to gather proof of income or file tax returns. This hearing, originally scheduled to be completed by December 2013, was already once adjourned. Although it was adjourned for reasons outside Mr. Howell's control and for no fault of his, it did give him an extra four months to file income tax returns or at the very least gather proof of income if he had any intention to do so. When compared with Mr. Howell's conduct and his evidence during the examination under oath, I am not persuaded that Mr. Howell intends to make a good faith effort to declare his income now. Even if he were an independent contractor, as has been submitted as a possibility, the fact remains that no income has been reported and no proof of income produced, whether as a contractor, employee of either Julia's Fine Cuisine or Atlantis Cooling or otherwise.

I find, however, that the failure to file income tax returns or to declare income is not itself grounds to dismiss the claim, as noted above. Mr. Howell's conduct in this regard is but one factor I have considered in the whole of Mr. Howell's pattern of conduct regarding the IRB claim.

It is undisputed that Mr. Howell, despite multiple requests dating back to 2009, has failed to clarify defects in his materials or verify his income. It is undisputed that he has not responded to Chartis' requests to clarify the nature of his employment, or the contradictions between the OCF-1 and the OCF-2.

Section 33 of the *Schedule* places a duty on an applicant to provide any information reasonably required to assist the insurer in determining the person's entitlement to a benefit.<sup>9</sup> When Chartis received Mr. Howell's OCF-1 and OCF-2, it advised by Explanation of Benefits Form (OCF-9) dated November 23, 2009 that it could not determine his potential entitlement to IRBs because of defects in his application for benefits. Following Mr. Howell's December 15, 2009 statement that he was paid in cash and did not report his income to the CRA, Chartis issued a further OCF-9 that explained it could not determine Mr. Howell's potential entitlement to IRBs because his OCF-2 was incomplete and contained conflicting information. The OCF-9 also requested

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<sup>9</sup> Section 33(1) at paragraph 1.

proof of his pre-accident income. Chartis continued to make multiple unsuccessful requests pursuant to section 33 requesting production of documentation to verify Mr. Howell's pre-accident income and to confirm whether he had declared any pre-accident income to the CRA.

It is also undisputed that Mr. Howell did not attend at any insurer examinations for the purpose of assessing his work-related disability. There is no evidence that he has at any point challenged the validity of the insurer's notices, or that the examinations were not reasonably necessary. In the absence of evidence of defects or problems with the notices, Mr. Howell gave no explanation, reasonable or otherwise, for not attending. I find, therefore, that Mr. Howell's failure to attend any insurer examinations without reasonable explanation has irrevocably prejudiced Chartis' ability to assess Mr. Howell for both the pre-104 and post-104 week disability tests.

Finally, with respect to the withdrawal of the claim, Mr. Howell's then-counsel confirmed during the June 29, 2010 examination under oath that he was not pursuing his IRB claim. The withdrawal was confirmed on the record, followed by the position taken that Mr. Howell would take no further questions about his income, and that all productions requested pursuant to section 33 of the *Schedule* would be refused if they related to the IRB claim.

Mr. Howell's then counsel confirmed the withdrawal in writing by letter dated October 18, 2010 to Chartis' counsel in which he wrote:

I will confirm that we have in fact withdrawn Mr. Howell's claim for Income Replacement Benefit[s].

Although Mr. Howell then mediated the IRB claim, he still, however, took no steps to substantiate the claim, provide any proof of income, declare income, or make himself reasonably available for an insurer examination. I find that this pattern of conduct is not consistent with a good faith effort to move his claim forward.

There is no evidence that the withdrawal was without prejudice or that Mr. Howell advised Chartis at any time in the months following the EUO that he had changed his mind or disagreed with what his counsel had represented. There are no new circumstances between his withdrawal and the effort to revive the claim insofar as Mr. Howell has still not produced any supporting documentation on the basis of which an IRB could be calculated and no evidence to contradict his statement during the examination under oath that he has no papers to file any returns. The information he has provided remains conflicting, he has not clarified his gross income and the claim remains unsubstantiated.

I find that Mr. Howell withdrew his claim on June 29, 2010 and confirmed the withdrawal in writing on October 18, 2010. As a result of the withdrawal, Chartis was further prejudiced by an inability to assess Mr. Howell or collect information regarding the IRB claim. I find that Chartis was entitled to rely on Mr. Howell's withdrawal and did so to its detriment.

## **Conclusion**

For the reasons set out above, I find that Mr. Howell's conduct as a whole as regards the IRB claim has created irrevocable prejudice to Chartis' ability to assess him, and to adjust and defend the IRB claim. I find that as a whole Mr. Howell's conduct amounts to an abuse of process and that he should as a result be precluded from bringing the IRB claim to arbitration.

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Jessica Kowalski  
Arbitrator

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July 30, 2014  
Date

Financial Services  
Commission  
of Ontario

Commission des  
services financiers  
de l'Ontario



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**ASTON HOWELL**

**Applicant**

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**CHARTIS INSURANCE COMPANY OF CANADA**

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## **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Howell's claim for income replacement benefits arising from the October 1, 2009 accident is dismissed.

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Jessica Kowalski  
Arbitrator

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July 30, 2014  
Date