CITATION: Belair Direct Insurance Company v. Green, 2018 ONSC 2782
DIVISIONAL COURT FILE NO.: 187/17
DATE: 20180507

2018 ONSC 2782 (CanLII)

ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

RE: BELAIR DIRECT INSURANCE COMPANY, Applicant

-and-

CHARMAINE GREEN and THE FINANCIAL SERVICES COMMISSION OF ONTARIO, Respondents

BEFORE: Swinton, Broad, and Myers JJ.

COUNSEL: *Eric Grossman and Patrick Baker*, lawyers for the Applicant

Alon Rooz and Lisa Bishop, lawyers for the Respondent Charmaine Green

Michael Spagnolo and Michael Scott, lawyers for FSCO

HEARD at Toronto: April 24, 2018

ENDORSEMENT

F.L. Myers J.:

[1] The applicant seeks judicial review of the decision of Director's Delegate Feldman dated November 16, 2016 in which he allowed an appeal in part from the decision of Arbitrator Richards dated December 18, 2014 dismissing Ms. Green's claim for statutory accident benefits.

[2] For the reasons that follow the application is allowed in part.

The Facts

[3] Ms. Green was involved in a car accident on September 20, 2009. She applied to Belair Direct for no-fault statutory accident benefits available under the *Statutory Accident Benefits Schedule – Accident on or after November 1, 1996*, Ont. Reg. 403/96 ("SABS").

[4] Ms. Green's claims included requests for the cost of extensive treatments by Osler Rehabilitation Centre Inc. and for the cost of numerous assessments by Assessment Direct Inc. The

service providers submitted eighty-five treatment and assessment plans to Belair Direct for Ms. Green between October 2009 and September 2010.

[5] Belair Direct paid approximately $70,000 for expenses and assessments in the first year following the accident.

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[6] By May 2010, Belair Direct became suspicious about the volume of claims being submitted by Osler and Assessment Direct in not only Ms. Green's case, but in a number of cases involving other insured persons. Belair Direct began refusing to pay for goods and services these companies recommended.

[7] In March 2011, Ms. Green commenced arbitration proceedings at FSCO.

[8] In June 2011, Belair Direct commenced an action against Osler and Assessment Direct in the Superior Court of Justice. The insurer alleged that the clinics conspired to unjustly enrich themselves by making material misrepresentations to the insurer regarding the goods and services that they provided to insured persons, among other allegations. The insurer also alleged that Osler and Assessment Direct were abusing the provisions of the SABS by inundating insurers with a huge volume of claims that an insurer could not possibly respond to within the ten day period set out in the SABS. Under the current iteration of the SABS, if an insurer fails to respond to a claim within the brief window provided, the insurer is deemed to accept the claim.

[9] Belair Direct alleged that Ms. Green suffered minor injuries at most and had acted with Osler and Assessment Direct to improperly file claims for services that were not only not needed but were not even provided in many cases.

[10] Arbitrator Richards agreed. He dismissed all of Ms. Green's claims, which included a claim for $1,074.74 for the cost of a follow-up in-home assessment and a claim for $127 related to the cost incurred in preparing a number of the claims that had already been accepted and paid by Belair Direct.

[11] The Arbitrator found that Ms. Green was not a credible witness and that none of the treatments that Osler claimed on her behalf were reasonable and necessary.

[12] The Arbitrator also found that Green failed to prove that the claimed in-home assessment had actually taken place.

[13] The Director's Delegate allowed Ms. Green's appeal in part. He allowed Ms. Green's claim of $127.44 for preparation of forms. He remitted the determination of four outstanding issues to a different arbitrator:

1. Whether Ms. Green is entitled to $1,074.74 for the cost of a follow-up in-home assessment recommended by Assessment Direct in March 2010.
2. Interest on overdue payment of benefits.
3. Entitlement to and quantum of a special award.

4. Expenses of the arbitration proceeding.

[14] Belair Direct submits that the Director's Delegate erred in interfering with the Arbitrator's findings of fact concerning the in-home assessment. Moreover, it bridles at the notion of having to pay for the cost of someone drafting claims for treatments that were themselves improper and part of an unlawful scheme to file improper claims.

Jurisdiction

[15] The court hears this application under ss. 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

Standard of review

[16] The parties agreed at the hearing that the standard of review is reasonableness.

[17] Wilton-Siegel J. recently described this standard of review in *Agyapong v. Jevco Insurance Company et al*., 2018 ONSC 878 (CanLII), in this way:

> [12] I am of the view that the appropriate standard of review of the Decision is reasonableness. In particular, the standard of review of the statutory interpretation of s. 35(3) of the SABS is reasonableness, as the exercise falls squarely within the Arbitrator's expertise in the interpretation of a home statute: see *Pastore v. Aviva Canada Inc*., 2012 ONCA 642 (CanLII) at para. 18. Similarly, the standard of review of the Arbitrator's determination with respect to the application of the principles of causation to the Applicant's case is reasonableness for the same reason. In addition, neither of these issues is of central importance to the legal system as a whole.
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> [13] In determining whether a decision is reasonable, the court is concerned largely with the justification, transparency and intelligibility of the Board's reasons, as well as whether the decision falls within a range of possible, acceptable outcomes, given the facts and law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at para. 47.

Fresh Evidence

[18] Belair Direct seeks to admit fresh evidence. It says that after the Director's Delegate released his decision, it settled its claims against Osler and Assessment Direct. Belair Direct has not disclosed the terms of the settlement to the court. However, it provided a copy of a letter from counsel for Osler and Assessment Direct to counsel for Ms. Green effectively releasing her from her obligation to pay for the claims of $127 and $1,074 that are the subject matter of this application.

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[19] Belair Direct argues that Ms. Green's claims are effectively moot. She has not "incurred" these expenses because she no longer has to pay the amounts for which the two disputed claims had been advanced.

[20] The panel dealt with the fresh evidence motion as a preliminary matter at the hearing of the application. It is clear that the letter only came into existence after the decisions below had been made. There is no basis to doubt its authenticity or reliability. It raises an issue that cuts to the core of the propriety of the claims advanced by Mr. Green. Accordingly, the panel admitted the fresh evidence in accordance with the legal test set out in *Palmer v. R*., 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759.

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The in-home assessment

[21] The Arbitrator held that Ms. Green had not proved that the March 2010 in-home assessment purportedly conducted by a Dr. Shteynberg had actually occurred. He did so based on his rejection of Ms. Green's testimony for reasons that he set out clearly. He also found the claims to be implausible in light of other circumstance proved to have been in play on the day of the alleged assessment. He also relied on frailties in the details of her actual testimony although he rejected the credibility and truthfulness of the testimony generally in any event.

[22] Under s. 283 (1) of the *Insurance Act*, an appeal from the Arbitrator to the Director's Delegate is confined to issues of law.

[23] The Director's Delegate rightly recited the law that provides that an error made finding facts may amount to an error of law if there is no evidence supporting the finding. He also held, citing *Housen v Nikolaisen*, 2002 SCC 33 (CanLII) at p. 253, that:

> …an error of fact becomes an error of law where, on appeal, it is determined that the trier of fact made a palpable and overriding error coming to a factual conclusion.

[24] However, this is not a correct statement of the law from the *Housen* case. The "palpable and overriding error" standard is the deferential test applicable on appeals where the appeal court or tribunal is *entitled* to review decisions for errors of fact or mixed fact and law. No case law allows an appellate body, whose jurisdiction is limited to reviewing errors of law, like the Director's Delegate, to review errors of fact. It can be an error of law to find a fact based on a misapplication of a legal principle or with no supporting evidence as noted above. But an appeal court or tribunal whose jurisdiction is limited to reviewing errors of law is decidedly not entitled to review findings of fact just because it believes the findings to be palpably and overridingly wrong unless the tribunal committed an identified error of law.

[25] The Director's Delegate expressly re-weighed the evidence that was before the Arbitrator concerning the in-home assessment. He disagreed with inferences drawn by the Arbitrator. In commenting on the absence of evidence of Dr. Shteynberg, he found that the Arbitrator had wrongly drawn an adverse inference that he should not have drawn. None of this analysis was

properly undertaken by the Director's Delegate. There was evidence before the Arbitrator that only he was entitled to weigh. In rejecting the evidence of Ms. Green and noting that Dr. Shteynberg had not testified, the Arbitrator was not drawing an adverse inference. Rather, he was commenting that without Dr. Shteynberg's testimony, there was simply no other testimony or evidence before him on which Ms. Green could rely to try to prove the expense claimed.

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[26] As the Director's Delegate was not authorized to review the Arbitrator's findings of fact, the decision that he made was not one within the range of reasonable alternatives that were open to him. As such, the decision is unreasonable and is set aside. The Arbitrator's conclusion – that Ms. Green was not entitled to be compensated as the assessment did not occur – is restored.

The $127 Expense for Filling out Forms

[27] The Directors' Delegate held that the Arbitrator made an error of law in allowing Belair Direct to escape paying for the expense claimed with respect to filling out claims forms for claims that the insurer had already paid. The insurer's position is that it is not a fair reading of the statute to require it to pay Osler or Assessment Direct to fill out forms for assessments that were unnecessary or did not occur.

[28] The Director's Delegate noted that under s. 38.2 (9) of the SABS, where an insurer fails to object to an application for approval, the insurer must "pay for all assessments and examinations to which the application relates." In this case, not only did the insurer refrain from objecting on a timely basis; it actually paid the charges claimed. The Director's Delegate noted the consumer protection purpose of the SABS. He reasoned that there was a greater risk of harm in allowing insurers to decline payments where they challenge the need for or propriety of an approved or deemed approved application compared to the harm of requiring insurers to pay where the insurer had the chance to object to an application and did not do so. While the odd outlier may exist where an injustice may appear to be done to an insurer, and perhaps this is one such case, the Director's Delegate determined that it is more important to give the words of the statute their plain and ordinary meaning so as to protect the integrity of the checks and balances already built into the system that adequately protect all parties in the vast majority of cases.

[29] The applicability of s. 38.2 (9) of the SABS was a question of law that fell within the appellate jurisdiction of the Director's Delegate. Therefore, his decision is entitled to deference regardless of whether the court would otherwise agree with the outcome.

The New Evidence

[30] Belair Direct argues that neither of the foregoing issues matters any longer because, as a result of its settlement with Osler and Assessment Direct, Ms. Green is no longer required to pay the charges of $127 or the $1,074 on which her claims were based. In effect, she has not incurred these expenses.

[31] Ms. Green relies on cases that provide that where an applicant was entitled to be paid but did not actually take the treatment or realize the benefits to which she was entitled, she remains

entitled to receive the applicable benefits under the SABS. To hold otherwise would incentivize an insurer to withhold payment to a claimant who cannot afford a treatment and then deny payment later on the basis that the claimant did not take the treatment or have to pay for it.

[32] Ms. Green also relies on the undoubted insurance law concept that the claim between insured and insurer is a bilateral contractual matter. What the insured does with insurance benefits properly received is no business of the insurer.

[33] Neither of these arguments fits the facts of the case before us. While it is correct that a person entitled to a benefit for a treatment may remain entitled to be paid even if she does not take the treatment and that an insurer does not control how an insured spends a benefit received, both of these principles assume that the insured was properly entitled to receive the benefit in the first place.

[34] We have already overruled the finding with respect to the in-home assessment, so the only claim at issue is the one for $127. As noted above, the Director's Delegate required the insurer to pay this claim because the insurer failed to respond to the assessment application on a timely basis. He held that it is not open to an insurer to question later whether the charge was incurred. Relying on the letter from counsel for Osler and Assessment Direct is another way to argue that the underlying charge was not incurred. Accordingly, it cannot be relied upon to undermine the applicability of s. 38.2 (9) of the SABS.

[35] While this appears to leave Ms. Green obtaining a windfall and benefiting from dishonest behaviour, we are not privy to the settlement between Belair Direct and Osler/Assessment Direct or the full dealings between or among Ms. Green, the two providers and Belair Direct. Accordingly, we do not have a full record to allow us to make this conclusion. In any event, the Director's Delegate held that the claim must be paid in accordance with the SABS provisions, even if not properly "incurred" under the SABS. His decision is entitled to deference.

[36] The application for judicial review is allowed to the extent that the Director's Delegate's order requiring a re-hearing of the claim for $1,074 relating to an in-home assessment is quashed. The Arbitrator's decision dismissing that claim is reinstated. I would not interfere with the Director's Delegate's order that the $127 be paid. I would make no decision as to whether or how interest, special awards, or costs in respect of these outcomes play out under the SABS or before FSCO.

[37] The insurer was successful reinstating the larger element of the Arbitrator's award. The respondent had a small measure of success but on a highly technical argument that appears to give her a windfall. Accordingly, this is a proper case in which costs should follow the main event. Ms. Green shall pay Belair Direct its costs of this application on a partial indemnity basis fixed in the amount of $5,000.00 all-inclusive.

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Myers J.

I agree ______________________________
Swinton J.

I agree ______________________________
Broad J.

Date: May 7, 2018

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