



**Citation: Aviva Insurance Company of Canada v. Lin, 2026 ONLAT 25-002242/AABS**

**Licence Appeal Tribunal File Number: 25-002242/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:

**Aviva Insurance Company of Canada**

**Applicant**

and

**Guo Qing Lin**

**Respondent**

**DECISION**

**ADJUDICATOR: Melanie Malach**

**APPEARANCES:**

For the Applicant: Maggie Morgan, Counsel

For the Respondent: Ryan Olson, Paralegal

**HEARD: By way or written submissions**

## OVERVIEW

- [1] Guo Qing Ling, the insured, was involved in an automobile accident on September 6, 2023, and received benefits from the insurer, Aviva Insurance Company of Canada, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The insurer claims repayment of Income Replacement Benefits (“IRBs”) paid to the insured and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

## ISSUES

- [2] The issues in dispute are:
- i. Is the insurer entitled to a repayment of \$26,617.14 relating to its payment of an IRB for the period of September 13, 2023 to January 10, 2025?

## RESULT

- [3] I find that the insurer is not entitled to a repayment of IRBs relating to the payment of an IRB for the period of September 13, 2023 to January 10, 2025.

## ANALYSIS

### ***Background***

- [4] On September 13, 2023, the insured submitted an Application for Accident Benefits (“OCF-1”) stating that he was retired at the time of the accident. He also submitted an Election of Benefits form (“OCF-10”) where he elected to receive a non-earner benefit (“NEB”).
- [5] On November 24, 2023, the insured sent a copy of his Employer’s Confirmation Form (“OCF-2”) and paystubs to the insurer confirming his employment up until the date of the subject accident.
- [6] On December 28, 2023, the insured submitted a revised OCF-1 stating that he was employed and working at the time of the accident as a kitchen helper from March 7, 2023 to September 5, 2023. He also submitted a revised OCF-10 where he elected to receive an IRB.
- [7] By correspondence dated January 31, 2024, the insurer advised the insured that in light of receipt of the revised OCF-1, the revised OCF-10, the OCF-2 and the

Disability Certificate (OCF-3), he may be eligible for an IRB. The insurer then stated that it has determined that the insured is entitled to a weekly IRB of \$400.00 per week for the period of September 13, 2023 to February 6, 2024, for the total of \$8,400.00 plus interest. It advised that biweekly IRBs would be paid at the rate of \$400.00 per week ongoing.

- [8] By correspondence dated January 17, 2025, the insurer wrote to the insured to advise that it was requesting repayment of IRBs in the amount of \$26,617.14, pursuant to s. 52 of the *Schedule*. The insurer advised that pursuant to s. 35(3) of the *Schedule*, the applicant's election on September 11, 2023, for a NEB is final, regardless of any change in circumstances, and can only be subsequently changed under subsection (2). It stated that as such, IRBs paid to the insured for the period of September 13, 2023 to January 10, 2025, has been made in error.

### ***The Law***

- [9] Pursuant to s. 35(1) of the *Schedule*, if an application indicates that the insured may qualify for two or more of the IRB, NEB and the caregiver benefits, the insurer shall give notice to the insured advising the insured that he or she must elect the benefit he or she wishes to receive. Pursuant to subsection (3), the insured's election under subsection (1) is final, regardless of any change in circumstances, and can be subsequently changed only if permitted under subsection (2) if he or she sustained a catastrophic impairment.
- [10] Section 52 of the *Schedule* concerns the repayment of benefits. Under s. 52(1)(a), a person is liable to repay to the insurer any benefit that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud.
- [11] Pursuant to s. 52(2) of the *Schedule* provides that the insurer must give notice of the overpayment, and section 52(3) of the *Schedule* restricts the requests for repayment to a period of no longer than 12 months following the error unless it was originally paid to the person as a result of wilful misrepresentation or fraud.

### ***Parties' Positions***

- [12] The insurer submits that it is entitled to a repayment of IRBs pursuant to s. 52 of the *Schedule* because the insured's original OCF-1 and OCF-10 elected a NEB. Pursuant to s. 35(3), the insurer argues that the insured is not entitled to change his election of benefits, and his original election is final regardless of any change in circumstances. (See: *G.N.K. v. Aviva Insurance Canada*, 2000 CanLII 30408 (ON LAT) ("G.N.K.")).

- [13] The insurer rejects the insured's position that it waived its right to deny the IRB on the basis that it initiated payment of the IRB after receiving the revised OCF-1 and OCF-10. The insurer argues that it is trite law that an insurer's decision to pay benefits does not constitute an estoppel or a waiver of its right to dispute entitlement at a future date. (See: *C.S. and Certas Home and Auto Insurance*, 2019 CanLII 51302 (ON LAT) ("C.S.")).
- [14] The insured submits that he is not required to repay IRBs pursuant to s. 52(1) of the *Schedule*. He argues that in error he elected the wrong benefit in his initial OCF-1 and OCF-10. Upon realizing that an error had been made, he provided a revised OCF-1 and OCF-10 as well as an OCF-2 and supporting income documentation claiming IRBs. The insured submits that the insurer then accepted the revised forms and found that he was entitled to an IRB based on the submitted income documentation and the insurer's s. 44 assessments. The insured submits that the IRB payments made to him were not made as a result of an error under s. 52(1) of the *Schedule*. The IRBs were paid to him based on the insurer's correct analysis that he is entitled to an IRB.
- [15] The insured further submits that s. 35(3) does not apply in this case as s. 35(1) had not yet been triggered by the time the insured provided an OCF-10. Section 35(3) only applies to elections made under s. 35(1). Section 35(1) applies to situations where the insured may qualify for two or more different weekly benefits. It also only applies to when the insurer requests an election from the insured. The insured argues that the insurer never requested an election of benefits prior to the submission of his OCF-10, therefore the OCF-10 initially submitted by the insured is not subject to s. 35 of the *Schedule*. The insured relies upon the Tribunal decision in *Jones v. The Co-Operators*, 2021 CanLII 13200 (ON LAT), where the Tribunal stated that "Nothing in the section addresses a unilateral right to make an election on the part of an applicant. It is for the insurer to review the application and determine if there are possible claims for an IRB and an NEB". The insured argues that even if his election in his initial OCF-10 is held to be final under s. 35(3) of the *Schedule*, the insurer's ultimate conclusion that the insured is entitled to an IRB negates this previous election and s. 35(3) does not apply.

***The Insurer is not entitled to a repayment of IRBs***

- [16] I find that the insurer is not entitled to a repayment of IRBs.
- [17] I find that while the insured initially submitted an OCF-1 stating that he was retired and an OCF-10 electing a NEB on September 13, 2023, I accept the insured's submissions that these forms were completed in error. This is

supported by the insured's submission of an OCF-2 and paystubs on November 24, 2023, and his submission of the revised OCF-1 and OCF-10 on December 28, 2023. I further find that based on the revised OCF-1, the revised OCF-3, the OCF-2 and paystubs, as well as the OCF-3, the insurer reviewed all of this documentation and determined that the insured was entitled to an IRB with back payments and interest owing to date. In my opinion, an insured is not held to a standard of perfection and mistakes in filling out forms or responding to forms are often made.

[18] The insurer relies solely on s. 35(3) *Schedule* to support that the insured's initial OCF-1 and OCF-10 wherein he elected a NEB is final. While the language of s. 35(3) does state that an election is final regardless of any change in circumstances, it does not provide for where an insured makes an error in his forms and has elected the wrong benefit. In this matter, I find that the revised forms were not provided due to a change in circumstances. They were provided because of an error made initially in submitting his forms.

[19] I find the insured's submissions persuasive that the *Schedule* is recognized as consumer protection legislation and it should accordingly be liberally construed in favour of the insured as confirmed by the Supreme Court of Canada in *Smith v. Co-Operators General Insurance Company*, 2022 SCC 30, 2. S.C.R. and the Court of Appeal in *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882 (CanLII). ). The Court of Appeal in *Tomec* stated that,

The SABs are remedial and constitute protection legislation. As such, it is to be read in its entire context and in their ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. The goal of the legislation is to reduce the economic dislocation and hardship of motor vehicle accident victims and as such, assumes an importance which is both pressing and substantial.

[20] I find that the insurer's narrow interpretation of s. 35(3) of the *Schedule* is incongruous with the *Schedule's* consumer protection purposes. I find that the insurer's interpretation that the insured is not allowed to make an error in completing forms is inconsistent with consumer protection legislation designed to provide fair compensation and minimize economic disruption in the lives of accident victims. In this matter, the insured made an error and improperly elected a NEB. Upon realizing the error, he then provided the insurer with a revised OCF-1 and OCF-10, along with the supporting income documentation, and properly elected an IRB. The insured's entitlement to an IRB was only assessed by the insurer after it received these revised forms, the supporting income

documentation and then further assessed the insured by way of s. 44 assessments to determine his entitlement. I find that the intent of the *Schedule* is to compensate accident victims for the benefits they are entitled to receive. I find that it is clear based on the OCF-2, the pay stubs, as well as the insurer's own s. 44 assessments that the insured is entitled to receive an IRB. I find that relying on a procedural error to seek repayment of IRBs is contrary to the intent of the *Schedule*.

[21] I also find that the decision cited by the insured in *Jones* persuasive, where the Tribunal referring to s. 35(1) of the *Schedule* held that,

Nothing in this section addresses a unilateral right to make an election on the part of an applicant. It is for the insurer to review the application and determine if there are possible claims for an IRB and NEB. Once it is determined that Mr. Jones was working and unequivocally qualifies for an IRB, then, by virtue of s. 12, there is no further requirement to put Mr. Jones to his election, notwithstanding that he might also meet the test for an NEB if he were not working. Mr. Jones cannot unilaterally frustrate the wording of the *Schedule* by filing an unsolicited OCF-10.

[22] Applying *Jones* to the facts in the subject matter, I find that the insurer was tasked with reviewing the insured's application and determining if he qualifies for an IRB or NEB. Once it determined that he qualified for an IRB, there is no requirement for the insured to make an election. Therefore, I find that it follows that the errors in the insured's initial election are cured by the insurer's own assessment and finding that he is entitled to an IRB.

[23] I further find that the Tribunal decision in *G.N.K.*, relied upon by the insurer, is distinguishable from the subject matter. In *G.N.K.*, the applicant attempted to re-elect to receive a NEB when he failed to meet the criteria for an IRB. By contrast, in the subject matter, the insured made an error in his forms and subsequently submitted a revised IRB that he was found to be entitled to. I find that the insured in this matter is not seeking a re-election because he is not entitled to a NEB. Rather an error was made in the initial forms submitted which were later rectified and accepted by the insurer.

[24] Section 52(1)(a) of the *Schedule* requires an insured to repay to the insurer any benefit that is paid to the person as a result of an error. As I have found that no error was made, and the insured was entitled to receive an IRB, no repayment is owing.

[25] For the reasons outlined above, I do not find that the insurer has proved on a balance of probabilities that it is entitled to a repayment of IRBs pursuant to s. 52 of the *Schedule*.

**ORDER**

[26] For the reasons outlined above, I find that the insurer is not entitled to a repayment of IRBs relating to the payment of an IRB for the period of September 13, 2023 to January 10, 2025. The Application is dismissed.

**Released: June 22, 2026**



---

**Melanie Malach**  
**Adjudicator**