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Ontario

RECONSIDERATION DECISION

Before: Sandeep Johal, Adjudicator

Date: October 5, 2020

File: 18-007521/AABS

Case Name: R.M. v. Certas Home and Auto Insurance Company

Written Submissions by:

For the Applicant: Kevan Wylie, Counsel

For the Respondent: Aryeh D. Samuel, Counsel

OVERVIEW

[1] The applicant filed a request for reconsideration from a decision dated March 5, 2020 in which I found the applicant to be statute-barred from disputing her claim for a non-earner benefit ("NEB") and a physiotherapy treatment plan in accordance with s. 56 of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] The applicant submits that I erred in law when I did not make reference to the Ontario Court of Appeal decision of *Tomec v. Economical,*[2] where, according to the applicant, it was held that a limitation period is subject to the rule of discoverability.

[3] According to the applicant, my original decision was an error of law because the *Tomec* decision changed the law on limitation periods under the *Schedule* and I did not refer to it in my decision. Furthermore, the original decision applied a "hard" limitation period and I did not apply the doctrine of discoverability in my original decision.

[4] The applicant further submits that I failed to consider relevant evidence, namely her MRI evidence, which according to the applicant is relevant to the issue of discoverability and my failure to consider it was an error of law.

[5] The applicant requests that the Tribunal set-aside its original decision and order a new hearing on the preliminary issues of the NEB and physiotherapy treatment plan.

RESULT

[6] The applicant's Request for Reconsideration is **denied**.

ANALYSIS

[7] The grounds for a Request for Reconsideration are contained in Rule 18.2 of the Tribunal's Common Rules of Practice and Procedure.[3] A request for reconsideration will not be granted unless one or more of the following criteria are met:

a. The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness;

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[1] O. Reg 34/10.
[2] 2019 ONCA 882 ("*Tomec*")
[3] Effective February 7, 2019.

b. The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;
c. The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or
d. There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

[8] The applicant in the present case submits and relies upon Rule 18.2(b) in that I made an error of law or fact such that I would have reached a different result had the error not been made.

No error of law with respect to discoverability

[9] The applicant submits that my original decision did not refer to the *Tomec* decision and that the *Tomec* decision changed the law with respect to limitation periods making them subject to the doctrine of discoverability, which I did not discuss in my original decision.

[10] The applicant relies upon the Tribunal case of *P.V. and Economical Insurance*,[4] in which the Tribunal has applied *Tomec* in the context of an income replacement benefit.

[11] The respondent takes the position that the facts in *Tomec* are distinguishable as it relates to a denial of a benefit *prior* to the eligibility of a benefit. (emphasis in original). In *Tomec*, the insurer denied attendant care and housekeeping benefits when the applicant's injuries were not at the level of a catastrophic impairment as defined in the *Schedule*.[5] Five years later, Tomec was found to have a catastrophic impairment and the insurer maintained the denials for attendant care and housekeeping as those benefits were denied years before Tomec was even eligible for those benefits. It was this type of situation which the Court of Appeal in *Tomec* found that the doctrine of discoverability applies.

[12] The respondent further relies upon the Tribunal cases of *V.C. v. Unifund Assurance Company*,[6] and *Applicant v. TD Home and Auto Insurance Company*.[7] In *V.C.* Vice-Chair Shapiro found that the applicant's claim for an NEB was two

[4] 2020 CanLII 12744 (ON LAT)
[5] Section 3.1 of the *Schedule*
[6] 2020 CanLII 27394 (ON LAT) ("*V.C.*")
[7] 2020 CanLII 30438 ("*TD Home and Auto*")

and a half months after the expiry of the limitation period and noted that "*Tomec* involved the denial of a benefit prior to eligibility and has no applicability here."[8]

[13] In *TD Home and Auto,* Adjudicator Boyce found *Tomec* to be applicable as the facts were similar. In *TD Home and Auto*, the applicant was denied benefits before they were even entitled to those benefits. According to Adjudicator Boyce, what *Tomec* does is "provide the lifeline to applicants whose benefits were pre-emptively denied by an insurer prior to their condition deteriorating to the point where they actually required the pre-emptively denied benefits. In my view, this is the purpose of discoverability."[9]

[14] According to the respondent, discoverability was not applicable to the issues in dispute from the original decision and it was therefore not an error of law by not applying *Tomec* in the original decision.

[15] I agree with the respondent. While I agree with the applicant that *Tomec* is binding authority on the Tribunal, the facts from *Tomec* are not applicable in the present case and there was no error in law by not referencing it in the original decision.

[16] The applicant's claim for a NEB and the physiotherapy treatment plan were not pre-emptively denied as was the case in *Tomec* where the attendant care benefit and housekeeping was pre-emptively denied even before the applicant was eligible to claim them.

[17] The applicant in the present case submits that the original decision did not reference her MRIs and that her claim for a NEB was not "discovered" until the MRI report was received on November 27, 2016. Therefore, according to the applicant, the limitation period was not "discovered" or did not begin to run until this date. Furthermore, it is the applicant's position that as a result of her potential catastrophic impairment she was incapable of commencing her Tribunal application.

[18] In paragraph 19 of the original decision, I reviewed the clinical notes and records and the medical documentation and it is trite law that not every piece of evidence needs to be addressed when rendering a decision. Only those that directly affect the main points or the issues in dispute should be referred to.

[19] The respondent's position is that the NEB and physiotherapy treatment were not pre-emptively denied as was the situation in *Tomec* and therefore the limitation period began on the date of the denial. Furthermore, eligibility to the NEB and the physiotherapy treatment plan was not triggered by the MRI report, unlike *Tomec*

[8] *V.C*. at footnote 7 to para. 20.
[9] *TD Home and Auto*, at para. 27.

where the benefit was triggered by an event (i.e. a catastrophic impairment designation). Eligibility in the present case is triggered by the respective tests as set out in the *Schedule* for a NEB and treatment plans which are the complete inability test,[10] and the reasonable and necessary test.[11]

[20] I agree with the respondent. Upon a review of the applicant's MRI's again, I do not find them to be in support of her position that they allowed her to "discover" that she had a claim for a NEB as a result. There is no mention of a complete inability to carry on a normal life in the MRI report or whether her L5/S1 disc protrusion--which is causing a mild deformation of the thecal sac and the left S1 nerve sheath,[12]-- causes the applicant any functional impairments as a result.

[21] The MRI from November 21, 2016 notes that the applicant had "mild diffuse disc bulging at C3-C4, C4-C5 and C5-C6 with no focal disc herniation or significant stenosis at any level and mild ectopia of the cerebellar tonsils, a normal variant."[13]

[22] Again, there is nothing in the MRI that discusses the applicant having a complete inability to carry on a normal life and in my view, there is nothing in the report that suggests she may have "discovered" a claim for a NEB.

[23] In paragraph 21 of the original decision, I addressed the applicant's submission of incapacity and her potential catastrophic impairment. The original decision noted that the applicant has not yet been found to have a catastrophic impairment and her submission that she was prevented from instructing counsel to commence her Tribunal application because of her impairments was not supported by the evidence.

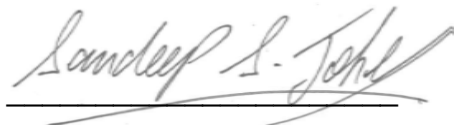
[24] With the onus on the party alleging the error, I find that the applicant has not satisfied her burden and as a result, I find that there was no error of law or fact such that I likely would have reached a different result.

CONCLUSION

[10] See s. 12 of the *Schedule*.
[11] See s. 15 of the *Schedule*.
[12] Reconsideration Submissions of the Applicant, Tab 5.
[13] Ibid at Tab 6.

[25] For the reasons noted above, I **dismiss** the applicant's Request for Reconsideration.

Released: October 5, 2020



Sandeep Johal, Adjudicator