Citation: Patton v. Aviva Insurance Company of Canada, 2024 ONLAT 23-014283/AABS -PI

Licence Appeal Tribunal File Number: 23-014283/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:

Cameron Patton

Applicant

and

Aviva Insurance Company of Canada

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Sherilyn Pickering, Counsel

For the Respondent: Maia Abbas, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Cameron Patton, the applicant, was involved in a motor vehicle accident on November 23, 2020, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied certain benefits by the respondent, Aviva Insurance Company of Canada ("Aviva"), and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

[2] The preliminary issue to be decided is:

a) Is the applicant barred from proceeding to a hearing for an income replacement benefit ("IRB") because the applicant failed to dispute the denial within the two-year limitation period?

RESULT

[3] The applicant is statute barred from proceeding with his claim for IRBs for the period outlined in his application to the Tribunal, pursuant to section 56 of the *Schedule*.

[4] The application is dismissed and the substantive hearing is vacated.

ANALYSIS

Background

[5] The applicant was involved in an accident on November 23, 2020.

[6] On March 18, 2021, Echelon Insurance acknowledged receipt of the application for benefits and advised the applicant he may qualify for IRBs. In this correspondence, it requested further documentation including a Disability Certificate ("OCF-3") and an Election of Benefits Form ("OCF-10").

[7] Both the OCF-3 and OCF-10 were submitted on March 19, 2021 and March 22, 2021.

[8] On March 29, 2021, Echelon Insurance requested a copy of an Employer's Confirmation Form ("OCF-2") from one of the applicant's employers, pursuant to s. 33 of the *Schedule*. It also cited s. 33(6) of the *Schedule*, which outlines the consequences of non-compliance with requests made under s. 33.

[9] On May 3, 2021, Echelon Insurance advised the applicant in a denial letter that the OCF-2 should have been received by April 13, 2021 but it was not. The letter further states: “Please note that no income replacement benefits are payable effective April 14, 2021 due to non-compliance as explained above.”

[10] In mid August 2021, Aviva took priority of this claim.

[11] On August 10, 2022, the requested OCF-2s were sent to Aviva.

[12] The applicant filed an application with the Tribunal on November 24, 2023.

Parties’ Positions

[13] Aviva submits that the applicant failed to bring his application within the two-year limitation period stipulated in s. 56 of the *Schedule*. It argues that Echelon Insurance advised on May 3, 2021, that no IRBs would be paid effective April 14, 2021, and provided information about how to dispute the denial. As such, it takes the position that this was a clear and unequivocal denial of the IRBs and is a valid denial under s. 33(6) of the *Schedule*. As such, the two-year limitation elapsed on May 3, 2023. Ultimately, the respondent contends that as the applicant failed to dispute the denial within the two-year limitation period, he is statute barred from pursuing his IRB claim.

[14] The applicant disputes that the denial was clear and unequivocal, as the respondent requested further information, being the OCF-2 from one of his employers. To support this position, the applicant relies upon *17-004556 v. Aviva Insurance Canada, 2018 CanLII 13157* (ON LAT) (“*17-004556*”). Alternatively, the applicant argues if it is found by the Tribunal that the denial for his IRB was on May 3, 2021, that only pertains to entitlement for IRBs starting on April 14, 2021, and not beforehand. Therefore, he submits that he is entitled to IRBs prior to April 14, 2021.

Law

[15] Section 56 of the *Schedule* provides that an application to dispute a denial of a benefit shall be commenced within two years of the insurer’s refusal to pay.

[16] However, in order for the provision under s. 56 to be triggered, the respondent must have provided a proper notice of denial, in accordance with the principles set out in *Smith v. Co-operators General Insurance Co*, (“*Smith*”) 2002 SCC 30. Pursuant to *Smith*, the refusal to pay the benefit must contain straightforward and clear language, it must be directed towards an unsophisticated person, it must

outline the dispute resolution process and the relevant time limits that govern the process, and it must provide valid or other reasons for the denial.

[17] Section 7 of the *Licence Appeal Tribunal Act, 1999* ("LAT Act") allows the Tribunal to extend a limitation period. In considering whether to exercise its discretion to extend the limitation period, the Tribunal must consider the following four factors set out in *Manuel v. Registrar*, 2012 ONSC 1492 (CanLII) ("*Manuel*"), to determine if the justice of the case requires the extension:

a) A bona fide intention to appeal within the limitation period;

b) The length of delay;

c) Prejudice to the other party; and

d) Merits of the appeal.

[18] The onus is on the applicant to establish reasonable grounds for an extension under section 7 of the LAT Act.

The respondent's denial notice was valid

[19] Upon review of the May 3, 2021 denial letter, I find that Aviva provided a denial that is compliant with the principles set out in *Smith*. The denial clearly advised the applicant that no IRBs were payable effective April 14, 2021. In my view, this denial was conveyed in a clear and straightforward manner as it was noted that no IRB was payable. The denial also was accompanied by notice of the two-year period for commencing the dispute resolution process and information on how to dispute the denial. Thus, this denial was *Smith*-compliant and triggered the two-year limitation period under the *Schedule* for IRBs starting on April 14, 2021.

[20] I am also not persuaded by the authority of *17-004556,* as the factual matrix before me is distinguishable. In *17-004556,* as noted at paragraph 12, the insurer's denial stated: "Should you be off work again due to the injuries sustained [in the] accident, we would require a updated Disability Certificate (OCF-3) to determine your eligibility." As such, Adjudicator Ferguson held that this denial could reasonably have led the applicant to believe that her options with respect to IRBs would be kept open in case her circumstances changed, and therefore her claim for IRB had not been denied with finality. Here, the language in the denial letter clearly conveys that no benefits would be payable.

[21] I am also alive to the applicant's position that the denial was not clear and unequivocal because further information and an OCF-2 was requested. I

acknowledge that the letter, dated May 3, 2021, states that it serves as Aviva's request for information under s. 33(1). However, the letter also stated that no IRBs were payable effective April 14, 2021, due to the applicant not providing the OCF-2 that was requested on March 29, 2021. While a s. 33 request alone does not trigger a limitation period; a refusal to pay a benefit that stems from a s. 33 requests does, which is the case here (see: *Q.S.Z. v. TD General Insurance Company, 2020 CanLII 30394* (ON LAT), at para. 23).

[22] The Divisional Court in *Landa v. The Dominion of Canada General Insurance Company* 2024, ONSC 2871, upheld the Tribunal's previous decisions. In particular, the Tribunal had determined in a preliminary issue decision that Dominion had issued valid denials to trigger the limitation period, despite the applicant's argument that the denials were deficient because it did not issue a final denial of some of the benefits.

[23] At the appeal, the appellant argued that while she is in agreement with the test in *Smith,* it was misapplied as the respondent asked for more information. As a result, she argued that this resulted in the denial being ambiguous, and that the benefits were not denied in plain, clear, and unequivocal language. The Court further noted at paragraphs 32 and 33 that:

> With respect to other benefits claimed, the letters advised Ms. Landa that "a treatment plan is required and upon receipt thereof, the request for funding will be reviewed", or "we will not fund the Treatment Plan as submitted" or "we will not fund this Treatment and Assessment plan pending the result of the Insurer's Examination". Ms. Landa submits that these denials are not clear and unequivocal.
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> However, the LAT found that these letters were accompanied by a notice of the two year period for commencing the dispute resolution process which was part of a Explanation of Benefits form which clearly set out that the item was not payable. The LAT also relied on its previous jurisprudence that insurer's requests for more information or a reference to an Insurer's Examination do not detract from a valid denial or re-start the limitation period.

[24] The Court determined that the appellant's submissions on this point had no merit, and that if her position was accepted, it would extend a claimant's entitlement to benefits for an indeterminate period of time, which is inconsistent with the rationale in *M.(K.) v. M.(H.)*,1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6 and *Haldenby v. Dominion of Canada General Insurance Co*. (2001) 2001 CanLII 16603 (ON CA), 55 O.R. (3d) 470 (C.A.), at para. 36. Moreover, it was noted in *Landa* that the appellant had not referred the Court to conflicting jurisprudence where it was held that because the insurer asked for additional information, the limitation period did not start to run (see paras. 34 to 37).

[25] I am bound by *Landa* and find the factual matrix similar to the matter before me. Here, the denial letter as noted above was compliant with the principles in *Smith*, as there was a clear and unequivocal denial of the applicant's IRB claim effective on April 14, 2021. There is also jurisprudence from this Tribunal that insurer's requests for more information do not detract from a valid denial or re-start the limitation (see: *K.K. v. Coseco Insurance Company,* 2020 CanLII 12713 (ON LAT) at para 18. Thus, I am not persuaded by the applicant's position that indeterminacy was caused by the respondent's request for an OCF-2.

[26] Next, the applicant argues that the respondent was non-compliant with the *Schedule*, for a variety of reasons. First, Aviva improperly requested an OCF-2 under s. 33(1), which allows insurers to request information and not forms. Second, Aviva did not assess whether he provided a reasonable explanation for the non-compliance under s. 34, nor did it calculate his IRB entitlement based on the other OCF-2 it had in its possession. Finally, the applicant argues that the respondent has not paid his IRBs up until April 14, 2021. As a result, he argues that as outlined in *Smith*, no refusal can be said to have been given if Aviva did not comply with the *Schedule*.

[27] Contrary to the applicant's submissions, *Smith* does not stand for the proposition that a refusal is only given when an insurer complies with the *Schedule* in its entirety. Indeed, at paragraph 11 of *Smith*, it was noted by the court that no refusal under s. 71 of the 1993 *Schedule* (now s. 54) can be said to be given by an insurer if there has not been adequate compliance with that section. In other words, the Court in *Smith* does not state that the insurer has to be compliant with the entire *Schedule* in order for its refusal to trigger the limitation period, rather, the denial letter must meet the principles in *Smith*, which it has here.

[28] In my view, the applicant also mistakenly conflates the legal requirements for a valid denial with the substantive legal requirements for denying a benefit. As the Ontario Court of Appeal held in *Sietzema v. Economical Mutual Insurance Company*, 2014 ONCA 111 ("*Sietzema*"), even legally incorrect reasons for a denial will not prevent the commencement of the limitation period. Citing its earlier decision *in Turner v. State Farm Mutual Automobile Insurance Co*. 2005 CanLII 2551(ON CA) ("*Turner*"), the court in *Sietzema* noted at para. 13:

> The purpose of the requirement to give reasons is to permit the insured to decide whether or not to challenge the cancellation. If the reasons given are legally wrong the insured will succeed in that challenge. Requiring that the reasons be legally correct goes beyond both the requirement in the relevant regulation, and the purpose of such a notice.

[29] As the Court of Appeal highlighted in *Turner* and in *Sietzema*, the first set of requirements address the sufficiency of the notice an insurer gives to an insured person of a dispute and the process for resolving that dispute. The latter set of requirements can only be determined through that dispute resolution process.

[30] It is open to insured persons who disagree with a denial to dispute the decision to withhold a benefit. The Tribunal may eventually determine that the reasons for the denial were not legally correct and order payment of the benefit. But the *Schedule* clearly sets out the rules governing that process. An insured person must formally commence the process by applying to the Tribunal within two years, which was not done here.

[31] Finally, I take note of the applicant's submissions that the denial letter only denied his entitlement to IRBs commencing on April 14, 2021, and not for the period beforehand. Also, the applicant argues that despite there being an agreement to pay for the period before April 14, 2021, he has not received it. However, this issue is not properly before me, as both in the Application to the Tribunal and the Case Conference Report and Order, the disputed time period for IRBs is from November 25, 2021 to date and ongoing. As such, my ruling only pertains to the time period of November 25, 2021 to date and ongoing.

[32] Having determined that Aviva's denial was valid and that the applicant failed to bring his application within the two-year limitation period stipulated in s. 56, I must still consider whether an extension of the limitation period should be granted pursuant to s. 7 of the LAT Act.

Section 7 of the LAT Act

[33] I do not find that the applicant has established that an extension of the limitation period pursuant to s. 7 is warranted.

Bona fide intention

[34] The applicant argues that the continuous correspondence, submitting the OCF-2, and his intention to add the issue of IRB at a previous case conference for a separate application, all demonstrate his bona fide intention to dispute the denial of his IRBs. Also, he has provided all the requested documentation to Aviva's counsel on December 19, 2023 and January 18, 2024.

[35] Aviva submits that despite the applicant's medical benefits being a very active file, he has not discussed or inquired with respect to the status of his IRBs. Nor,

has he provided further income or employment documentation to substantiate his claim for IRBs.

[36] I find that the applicant has failed to show a bona fide or good faith intention to appeal within the appeal period. I have found that the limitation period ended on May 3, 2023, and the applicant has not directed me to evidence that supports he attempted to dispute the denial before this date. Instead, an attempt was made after the limitation period had expired (October 31, 2023) to add IRB as an issue in dispute at a case conference for a separate application. While the applicant followed up for an OCF-2 from 2021 to 2022, and provided this to Aviva on August 10, 2022, this does not demonstrate a bona fide intent to appeal. Rather, the applicant provided the information requested by Aviva.

Length of the delay

[37] The applicant does not provide an explanation for the delay in his submissions, and rather argues that the Tribunal has to determine which date the limitation period began.

[38] The respondent submits that this application was filed on November 24, 2023, which is seven months after the expiration of the two-year limitation period.

[39] The Tribunal has refused requests to extend a limitation period for shorter periods. For example, in *Mai v. Aviva Insurance Company of Canada*, 2022 CanLII 2664 (ON LAT), Vice Chair Farlam refused the applicant's request to extend a limitation period by five months and determined that a five-month delay in filing the application was excessive.

[40] In this case, the applicant did not file an application until November 24, 2023, which is a six-month delay. Significantly, the applicant has provided no explanation for the delay. I find the delay is significant.

Prejudice to the other party

[41] The applicant submits that the respondent already had its IE reports prior to the commencement of the application and could have completed additional assessments but chose not to do so. Also, he argues that there is no evidence that the records or witnesses will not be available if the matter were to proceed. The applicant submits that he would be severely prejudiced by a bar on his claim for IRBs.

[42] Restricting access to dispute resolution on the merits will almost always have a greater impact on an individual than it will on an insurance company. However,

the Divisional Court indicated in *Manuel* that the decision maker is to focus on the prejudice to the other party, in this case, the respondent insurance company.

[43] There is also the potential for systemic prejudice to insurers if the Tribunal were to consistently take a broad interpretation of that rule making the limitation period outlined in s. 56 essentially meaningless. There is inherent prejudice to a party when they are unable to rely on the *Schedule* or the limitation period. There is a public interest in the finality of proceedings captured by the limitation period. Section 7 of the LAT Act allows the possibility that in special circumstances, the Tribunal may extend the limitation period. The extension is not granted automatically simply because the absence of an extension might deny an applicant the right to a hearing.

The merits of the appeal

[44] The applicant submits that there is a reasonable chance of success, as he did not return to his own occupation within the first 104 weeks following the accident.

[45] Public interest and legislative intent weigh in favour of giving effect to limitation periods. The applicant has the burden to establish the factors favouring an extension, but he has not directed me to any evidence of special circumstances that would tip the balance of justice in favour of granting the extension. Having considered the evidence before me, I find that the applicant has not met his onus to establish that the justice of the case favours an extension of time to file the application. Accordingly, I decline to use the Tribunal's discretion to extend the limitation period under section 7 of the *LAT Act*.

CONCLUSION AND ORDER

[46] For the reasons outlined above, I find that:

a) The applicant is statute barred from proceeding with his claim for IRBs for the period outlined in his application to the Tribunal, pursuant to section 56 of the *Schedule*.

b) The application is dismissed and the substantive hearing is vacated.

Released: July 12, 2024

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Tanjoyt Deol
Adjudicator