Tribunal File Number: 18-009498/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

M.H.

Applicant

and

Western Assurance Company

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR:	**Jesse A. Boyce**

APPEARANCES

Counsel for the Applicant:	Adam J. Aldersley
Counsel for the Respondent:	Jennifer Griffiths
	Aryeh Samuel

Written Hearing on:	**September 10, 2019**

OVERVIEW

[1] The applicant, M.H., was injured in a motor vehicle accident on September 30, 2012. M.H. sought benefits from the respondent, Western Assurance Company ("Western"), pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] Western paid income replacement benefits ("IRBs") to M.H. following the accident but later denied M.H.'s claim for a post-104-week income replacement benefit on the basis of a section 44 Insurer's Examination ("IE"). M.H. disagreed and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for dispute resolution.

[3] A case conference was held, but the parties could not resolve the issues in dispute, prompting this written hearing on the following issues. Western raised the preliminary issue that M.H. is statute-barred from proceeding with her application due to her failure to file her application within the two-year limitation period.

PRELIMINARY ISSUE

[4] The following preliminary issue was raised by the respondent:

i. Is the applicant barred from proceeding with her claim for income replacement benefits as she failed to commence her application within two years after the respondent's refusal to pay the amount claimed?

RESULT

[5] I find that M.H. is barred from proceeding with her claim for IRBs as she failed to commence her application within two years after a valid denial by Western and an agreement to extend the limitation period by the parties.

BACKGROUND

[6] The timeline of events and the conduct of the parties since the denial are important to this matter. These are the facts, as I understand them: following the accident of September 30, 2012, M.H. applied for and was paid IRBs by Western.

[7] In early 2014, Western requested new OCF-3 forms from M.H. in order to assist it in determining whether she continued to be entitled to IRBs at the post-104-week mark. M.H.'s family doctor, Dr. Mankal, signed and submitted the requested forms on January 20, 2014 and June 5, 2014, respectively.

[1] O. Reg. 34/10.

[8] Between June 5, 2014, and July 2, 2015, M.H. underwent seven IE's arranged by Western for the purpose of determining her ongoing entitlement to IRBs. On July 2, 2015, Western sent M.H. its Explanation of Benefits ("OCF-9") correspondence package denying her post-104-week IRBs on the basis of seven IE reports it was relying on. The OCF-9 indicated that M.H. did not meet the test for entitlement and provided the date that her IRB would be terminated.

[9] On July 3, 2015, Dr. Mankal received a copy of the OCF-9 by fax from Western. The only reports included in that fax were two copies of the report of Dr. Day, dated June 26, 2015. In his affidavit, Dr. Mankal confirms that he never received copies of the other six reports that Western relied on in its denial.

[10] Nearly two years later, on June 22, 2017, M.H. applied to the Tribunal to appeal Western's denial of her post-104-week IRB. At the case conference held on September 18, 2017, M.H. confirmed that she would be withdrawing her claim for IRB pending the completion of a catastrophic assessment and further settlement discussions.

[11] In turn, Western agreed to extend, or "toll", the limitation period for M.H.'s IRB denial. On consent, the parties agreed to toll the limitation period for ten months from July 2, 2017 to April 13, 2018. The agreement was confirmed via email correspondence.

[12] M.H. did not re-file her application for dispute resolution of the denial of her post-104-week IRB with the Tribunal during the tolling period or by the April 13, 2018 deadline.

[13] On October 19, 2018, M.H. recommenced her application for IRBs with the Tribunal, six months after the tolling agreement expired.

ANALYSIS

The preliminary issue

[14] With the framing of the preliminary issue in mind, the parties disagree in submissions on what exactly is in dispute. In its submissions, Western frames the issue as one concerning section 7 of the *Licence Appeal Tribunal Act*[2] ("*LAT Act*"), which affords the Tribunal the discretion to extend a limitation period if several factors are met. Western argues that M.H. is not only statute-barred from proceeding with her application due to her failure to appeal its denial of her IRB within two years, but also that there is no reason why the Tribunal should extend the limitation period on the basis of section 7.

[15] On the contrary, M.H. frames the issue as a very technical, procedural failure by Western to meet the consumer protection standards imposed by the *Schedule*.

[2] 1999 S.O. 1999, Ch. 12, Sch. G, at s. 7.

She argues that Western's denial of her IRB was not a valid denial under section 37(5) of the *Schedule*, as it failed to provide all of the IE reports on which it relied to the practitioner who signed her OCF-3. Accordingly, M.H. argues that the limitation period never actually began to run despite the actions of the parties. I disagree with M.H.

Western's denials and Smith v. Co-operators

[16] Before delving into the nuances of the parties' arguments, it is important to determine whether Western's notice of denial was proper in accordance with the principles outlined in *Smith v. Co-Operators General Insurance Company.*[3] Generally, notices of refusal to pay benefits must contain straightforward and clear language, must be directed towards an unsophisticated person, must outline the dispute resolution process and the relevant time limits that govern the process and must provide valid medical or other reasons for the denial. If an insurer's notice to an insured does not meet these basic requirements within certain timelines prescribed by the *Schedule*, the denial is invalid, and the two-year limitation period under the *Insurance Act* is not triggered.

[17] On review of the notices, I find that Western's denials were proper and in accordance with the *Schedule*'s requirements and the principles of *Smith*. Further, I find that the notices of refusal to pay benefits provided by Western contained straightforward and clear language (including the date when M.H.'s IRB would terminate), were directed towards an unsophisticated person (the language is simple and I note M.H. also had counsel), outlined the dispute resolution process (the standard form outlining the options is attached), stated the relevant time limits that govern the process (the two-year warning notice is bolded and prominent) and provided valid reasons for the denial (on the basis of seven IE's). In her submissions, while M.H. details the *Smith* requirements, it does not form the root of her argument.

Section 37

[18] Indeed, M.H.'s argument is instead rooted in section 37 of the *Schedule*, which prescribes the notice requirements that guide an insurer when denying an insured's claim for a benefit. Under section 37(5) and (6), within ten business days of receiving a report following a section 44 IE, an insurer shall provide a copy of the report to the insured and the treating practitioner who completed the OCF-3 and determine whether or not to continue paying a specified benefit. If the insurer denies the benefit, it must also specify the medical and other reasons it relied upon in doing so.

[19] Here, M.H. argues that Western only provided two of the reports and not all seven of the IE reports it relied on to Dr. Mankal, rendering the notice of denial

[3] 2002 SCC 30, at para 14.

invalid. In support of her position, M.H. relies on *Allstate Insurance Co. of Canada v. Klimitz, Nadarajah v. RBC General Insurance Company*[4] and an affidavit from Dr. Mankal confirming that he did not receive all of the reports. Further, M.H. argues that "the Tribunal cannot retroactively certify an improper denial" and that considering any extrinsic evidence to the denial itself would be improper.

[20] I disagree. M.H. seems to overlook the fact that she applied to the Tribunal within the limitation period and then extended the limitation period by her own agreement. While her argument is creative, I find there are several factors, including the conduct of the parties after her application to the Tribunal, to support the position that Western's denial was not only proper, but that M.H. was well-aware that her claim had been denied. Further, I find the case law is distinguishable and that section 37(5) provides no specific consequences to an applicant even in the event of non-compliance by an insurer.

[21] Again, I find no evidence that Western did not comply with the principles articulated by the Supreme Court in *Smith*. In a similar vein, the Court of Appeal has consistently held that as long as an insurer provides a valid refusal, a limitation period should be strictly applied. In addition, a clear and unequivocal notice given by the insurer terminating the insured's benefits is sufficient to trigger the limitation period.[5]

[22] On the facts, I find M.H.'s conduct, despite her urging that it should not be considered, to be rather damning evidence that she was aware her IRB was being terminated and that the limitation period had been triggered on July 2, 2017. No evidence has been put before the Tribunal to indicate that she took issue with Western's notice at the time it was provided, that she personally did not receive the notice or that it was technically or procedurally defective. Indeed, she was clearly aware that the IRB had been terminated and that a two-year limitation period applied based on the fact that *she applied to the Tribunal to appeal Western's decision to deny her entitlement within the limitation period*. By applying to the Tribunal mere weeks before the two-year mark, it is clear evidence of M.H.'s understanding that there was a limitation period governing her entitlement and that therefore Western's denial was perfectly valid.

[23] Even if this were somehow untrue and M.H. was not aware of the limitation period and applied prior to the two-year mark by coincidence (which she has not argued), I find M.H.'s decision to withdraw her claim for IRB at the case conference level while simultaneously agreeing to toll the limitation period to April 13, 2018, on consent, to be compelling evidence that she believed

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[4] ["*Klimitz*"] 2014 ONSC 7108, aff'd 2015 ONCA 698, at para 40; and ["*Nadarajah"*] 2013 O.F.S.C.D. No. 239.

[5] *See, for e.g., Sietzema v. Economical Insurance*, 2014 ONCA 111 and *Turner v. State Farm*, 2005 OJ No. 351 (C.A.).

Western's denial was valid. No evidence was put before the Tribunal to indicate that she was not aware of the limitation period or that she did not agree to the tolling extension at the case conference or in subsequent correspondence. M.H. did not provide evidence indicating her technical objection to Western's denial at any time in the over three-year period between Western's denial in July 2015 and the recommencement of her application in October 2018.

[24] Given my finding that Western's notice was clear and unequivocal, that M.H. applied to the Tribunal before the two-year mark, that she did not object to Western's denial at any point prior to this preliminary issue hearing and that she agreed at the case conference to extend the tolling period, it is incredibly disingenuous and, in my view, something of a *Hail Mary*, to now argue, four years later, that the notice of denial was not valid under section 37(5).

[25] Further, I do not agree with M.H.'s position that statute-barring her from proceeding with her application despite Western not providing Dr. Mankal with copies of all the reports constitutes a "retroactive certification" of a denial by the Tribunal. By her conduct, I find M.H. "certified" the denial herself, in real time, over a three-year period by not objecting to Western's alleged oversight at the time of denial, by applying to the Tribunal within the limitation period and by agreeing to the tolling extension that she then missed. Conduct aside, I reiterate that Western's denial was clear and unequivocal notice to M.H., which triggered the limitation period in spite of any of the alleged technical compliance issues anyways. Indeed, this is why *Klimitz* and *Nadarajah* are so easily distinguished. Not only were those cases decided under an older Regulation, in both cases, the insurance company failed to provide the requisite notice and reports *to the applicant*. In my view, those facts constitute non-compliance of actual significance, as the lack of information would have actually robbed the applicant of her ability to weigh her options on whether to dispute her denial within the limitation period.

[26] This was not the case here. M.H. has not argued that she or her counsel did not receive the notices or the reports from Western. Obviously, M.H. has not argued that her ability to determine whether to dispute the denial was prejudiced because she, in fact, applied within the limitation period. M.H. has not indicated whether she, her counsel or Dr. Mankal told Western at any point that the reports were not included and asked for them to be faxed. M.H. did not advise Western at any time that her ability to determine a course of action was hindered because her treating physician did not receive all of the IE reports. Rather, M.H. simply argues that because Dr. Mankal did not receive all seven reports, that the denial is retroactively invalid under section 37(5).

[27] In response, Western argues that the final report that was provided to Dr. Mankal with the denial, that of Dr. Day, was the deciding factor in its decision to deny IRB. While I note the OCF-9 lists all seven reports in its denial, given the

timeline and evidence provided by Western, I see no reason to doubt its contention that this was the case and find there is certainly no evidence of bad faith. In any event, since the denial was clear and unequivocal and met all of the requirements of the jurisprudence, I find the limitation period was triggered.

[28] Finally, while I find Western's alleged failure to provide all seven of the IE reports to Dr. Mankal at the time of its denial is a mere technicality under section 37(5) that did not prejudice M.H., I find the *Schedule* provides no specific consequences even in the event that M.H. was prejudiced by Western's technical non-compliance. The Tribunal cannot arbitrarily impose a consequence as extreme as extending a limitation period for what would now amount to over two years since the initial two-year limitation period elapsed, particularly in this circumstance, where M.H. actually met the two-year deadline and where the parties consented to an additional ten-month tolling period after she withdrew her IRB application and began pursuing her catastrophic claim. M.H. then missed the new limitation deadline by over six months and now claims her conduct and the agreement between the parties is somehow extrinsic to the facts of the dispute.

[29] Accordingly, I find Western provided M.H. with a valid denial of her post-104 IRB. The denial was clear and unequivocal and provided M.H. with the requisite information to determine whether to dispute the denial while also triggering the limitation period. M.H. appealed to the Tribunal within the two-year limitation period and then consented to a tolling extension before withdrawing her application. She then failed to recommence her application in time. On these facts, I find she is statute-barred from proceeding.

Section 7 of the LAT Act

[30] Section 7 of the *LAT Act* affords the Tribunal statutory discretion to extend the time for commencing a proceeding in certain circumstances if it is satisfied that there are reasonable grounds for applying for the extension and for granting relief. There are four factors that the Tribunal weighs in determining whether the justice of the case requires that an extension be granted: i) the existence of a *bona fide* intention to appeal within the appeal period; ii) the length of the delay; iii) prejudice to the other party; and iv) the merits of the appeal.[6] These four factors are not strict elements that must each be met in order to grant an extension of time. Rather, they are a guide to assist in determining the justice of the case. Whether to grant an extension of time depends on the specific facts of each case.[7]

[6] *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002*, 2012 ONSC 1492 (CanLII).
[7] *A.F. v. North Blenheim Mutual Insurance Company and N.L. v. North Blenheim Mutual Insurance Company*, 2017 CanLII 87546 (ON LAT), at paras. 28-30.

[31] Having determined that Western's denial was valid, justice still requires that the Tribunal consider whether an extension of the limitation period should be granted. Despite providing substantive submissions, Western argues that on a plain statutory interpretation, the *LAT Act* does not apply because the limitation period in question was not fixed under an Act *per se*, as the language of section 7 dictates, but rather by private agreement of the parties in their tolling agreement. While certainly creative, I disagree and find that the tolling agreement between the parties was an extension of the limitation period prescribed by the *Insurance Act* and the *Schedule* and therefore, the Tribunal retains jurisdiction to consider an extension under section 7 of the *LAT Act*.

[32] In any event, I find M.H. has not provided substantive submissions on whether an extension should be granted under section 7 and I find that the factors weigh in favour of Western. First, while M.H. agreed to the tolling extension, there is no evidence that she took any action to maintain her appeal during the ten-month period the parties agreed on, even while she was compiling her catastrophic case, and then only submitted her application six months after the deadline. Second, I find the length of the delay in acting on the IRB—six months after the deadline of the tolling agreement—to be in excess of what has been deemed permissible in the Tribunal's jurisprudence and no explanation for the delay was provided. Third, I take Western's point that the potential for prejudice almost always weighs in favour of the applicant but do find there is prejudice to the insurer here as well, as Western relied on a mutually agreed upon extension to its detriment. Finally, although it is not enough to tip the balance in her favour given the catastrophic application before the Tribunal, I accept that there may be merit to M.H.'s claim without deciding on the substantive factors of her claim. Unfortunately, in my view, this factor is not enough to outweigh the other factors.

[33] Accordingly, for these reasons, the Tribunal declines to exercise its discretion under section 7 of the *LAT Act* to extend the limitation period.

CONCLUSION

[34] I find Western provided M.H. with a valid denial of her post-104 IRB. The denial was clear and unequivocal and provided M.H. with the requisite information to determine whether to dispute the denial while also triggering the limitation period. M.H. appealed to the Tribunal within the two-year limitation period and then consented to a tolling extension before withdrawing her application. She then failed to recommence her application in time. On the facts, I decline to exercise the Tribunal's discretion to extend the limitation period under the *LAT Act*.

[35] Accordingly, I find M.H. is statute-barred from proceeding with her application for IRB at the Tribunal. The application is dismissed.

Released: September 16, 2019

Jesse A. Boyce
Adjudicator