LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: Hasford vs. Aviva General Insurance, 2021 ONLAT 19-010256/AABS

Released Date: 01/08/2021
File Number: 19-010256/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:

Cyprian Hasford

Applicant

and

Aviva General Insurance

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Savannah Chorney, Counsel

For the Respondent: Nathalie V. Rosenthal, Counsel
Nathan M. Fabiano, Counsel

HEARD: **Via written submissions**

OVERVIEW

[1] The applicant was injured in an accident on November 14, 2015 and sought various benefits from the respondent, Aviva, pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010[1] ("*Schedule*"). For the purposes of this preliminary issue hearing, Aviva submits that it properly denied all of the applicant's claims between 2015 and 2017.

[2] The applicant filed an application with the Tribunal dated August 21, 2019, identifying 14 issues as being in dispute, including a Minor Injury Guideline ("MIG") determination, an Income Replacement Benefit ("IRB"), a claim for Attendant Care ("ACBs") and housekeeping, nine medical, rehabilitation and expense claims, a catastrophic determination ("CAT") and an award under s. 10 of O. Reg. 664.

[3] A case conference was held where Aviva raised a preliminary issue with respect to the applicant being statute-barred from proceeding with his application by virtue of s. 56 of the *Schedule* because the two-year limitation to appeal its denials had elapsed. A written preliminary issue hearing was set down.

[4] The applicant submits that all of Aviva's denials were improper under the *Schedule* and as a result, his application should not be statute-barred under s. 56 He further relies on s. 7 of the *Licence Appeal Tribunal Act*[2] to assert that the merits of his case warrant an extension of the limitation period.

ISSUE IN DISPUTE

[5] Therefore, the sole issue in dispute is as follows:

i. Is the applicant prevented from appealing the denial of benefits in this application because he failed to commence the appeal within two years of the date that the claims for benefits were denied, as required by s. 56 of the *Schedule*?

RESULT

[6] I find the applicant is statute-barred from appealing the denials of his benefit claims under s. 56 of the *Schedule* as he failed to dispute Aviva's valid denials within the limitation period and has not demonstrated that an extension of time under s. 7 of the *LAT Act* is warranted.

ANALYSIS

Aviva's denials; Smith v. Co-Operators

[1] O. Reg. 34/10, as amended.
[2] 1999, S.O. 1999, c. 12, Sched. G. ["*LAT Act*"].

[7] To begin, it is well-settled that an application under s. 280(2) of the *Insurance Act* in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed. In order to trigger the running of the limitation period, the insurer must provide clear and unequivocal notice of a refusal to pay benefits. In *Smith v. Co-Operators Gen. Ins. Co.*[3], the Supreme Court of Canada articulated the requirements that an insurer must satisfy in order for there to be a proper denial of benefits: straightforward and clear language to inform a person of the dispute resolution process; language directed towards an unsophisticated person; identification of the person's rights to dispute the denial; and the relevant time limits that govern that process.

[8] Here, Aviva submits that there is no genuine issue regarding the expiration of the limitation period because it issued proper denials for every one of the applicant's benefit claims, in accordance with the direction provided by the SCC in *Smith*. Further, Aviva argues that the applicant has also been represented by counsel since November 27, 2015 and all of his lawyers in the post-accident period were put on notice of the denials and were served with courtesy copies of same. Notwithstanding this fact, Aviva asserts that the applicant made no attempts to dispute the benefits until August 21, 2019, which is well after the two-year limitation period had elapsed.

[9] In response, the applicant submits that Aviva's denials do not meet the minimum requirements for notice under the *Schedule*. With regards to his IRB claim, he submits that Aviva's notice failed to include a definition of the substantial inability test of the section. With respect to the medical and rehabilitation benefits, he submits that the notices failed to include medical or "other" reasons, did not advise the applicant of the definition of the MIG and, in one case, did not provide a copy of s. 38(2) of the *Schedule*. The applicant submits that Aviva's request for more information regarding one of his expense claims was not an unequivocal denial. Finally, with respect to his ACB claim, he asserts that Aviva has never issued a denial.

[10] On review, I find that all of Aviva's denials in evidence easily meet the notice requirements articulated in *Smith*. To be frank, I find the explanation of benefit ("EOB") letters Aviva issued to the applicant in this case are some of the most detailed and specific denial notes I have come across. In my view, the EOB's in evidence go beyond the minimum notice requirements to the point that it is difficult to reconcile how any applicant, let alone an applicant that has been represented by counsel throughout his claim, would not be able to understand that Aviva was denying the claim and that they had two years to dispute it.

[11] Indeed, Aviva's EOB dated May 12, 2016 provides clear and unequivocal notice that the applicant's IRB payments were terminated. The notice provides the type of benefit, the amount of the benefit, cites the legal test, identifies and includes the s. 44 report that the denial was based on, identifies the medical practitioners

[3] [2002] S.C.J. No. 34., at para. 14. ["*Smith*"].

who completed the report, provides the date of termination, the amount of the final cheque, states the two-year limitation notice in bold lettering on the first page and, critically, provides all of the information that an unsophisticated applicant would require to dispute the determination. The denial also advises the applicant to review the reports for a more detailed explanation of the assessor's opinions and findings. There is no doubt the limitation period was triggered.

[12] The EOB dated December 9, 2015 refers to the applicant's OCF-1 and OCF-3 and clearly states that he was not eligible for a Housekeeping and Home Maintenance benefit because he was not CAT and did not purchase the optional benefits that would entitlement him to housekeeping and home maintenance. The applicant has not provided evidence to suggest either of these denial reasons were incorrect or that this notice was unclear, so I find the limitation period to dispute this denial elapsed on December 9, 2017.

[13] I find the EOBs for the various medical and rehabilitation benefits similarly meet the notice requirements articulated by *Smith*. The notices are all clear and are written in language that an unsophisticated person would understand. All of the notices identify the two-year limitation period and the dispute resolution process. The EOB dated February 12, 2016 clearly indicates that more information was required to process the expense claim in the OCF-6 and identified the documents Aviva was requesting, which the applicant did not produce. The OCF-18 addressed in that EOB was partially approved by Aviva, and the notice indicates that the remaining $272 was denied because the applicant's MIG limits were exhausted. The March 30, 2016 EOB responding to an OCF-18 for chiropractic treatment and massage was denied based on the MIG and Aviva provided notice in the same EOB that it would be scheduling a s. 44 examination to assess entitlement because the MIG limits were exhausted at this point.

[14] Meanwhile, the June 8, 2016 EOB addressing two OCF-18s identifies the benefits claimed, confirms that the s. 44 report found the applicant's injuries to be within the MIG, cites the report that determined same, reminds the applicant again that the MIG limits have been exhausted and states that the denial of the second OCF-18 was because it is a duplication of a previously submitted claim. The EOB further states that since the applicant did not present new medical evidence and his physical status had not changed following the s. 44 examination, Aviva was relying on its previous report. The EOB includes the two-year limitation period notice and dispute resolution process information.

[15] The October 26, 2016 EOB addressing an herbal medicine claim clearly states that the claim was denied because it was not properly submitted in an OCF-18 and, again, because the applicant's MIG limits had been exhausted. The EOB dated March 2, 2017 clearly denied the applicant's prescription claim based on the MIG limits being exhausted and clearly requests more information related to his claim for glasses. The letter requests the glasses damaged or a photo of same, the original invoice for the glasses, and a description of how the glasses

were damaged in the accident. Aviva submits that it has yet to receive the information requested, which the applicant provided no evidence to dispute.

[16] Accordingly, on review of all of the EOB letters in evidence, I find no indication that any of Aviva's denial notices were deficient under the *Schedule* or did not meet the requirements for notice articulated by the SCC in *Smith*, as alleged. Each of the denials clearly identified the two-year limitation period and, since the applicant's application to the Tribunal was not filed until August 21, 2019, I find he is statute-barred from proceeding with all of his denied claims under s. 56, as the two-year limitation on each of these benefits elapsed over two years prior to the submission of his application. The applicant is out of time.

ACBs, Property Damage, CAT, MIG

[17] The applicant's submissions also addressed a number of other issues that do not have corresponding EOB denial letters, being ACBs, a property damage claim, a CAT claim and a MIG determination. I address each in turn.

[18] The applicant asserts that Aviva has never denied his claim for ACBs, with his sole submission on this issue being, Aviva "has never sent a letter even remotely addressing Attendant Care Benefits." In response, Aviva submits that a Form-1 has never been provided to it by the applicant.

[19] It is well-settled that in order to apply for ACBs, a Form-1 is required pursuant to the mandatory instructions provided by s. 42(1) and s. 19(2) of the *Schedule*. Without a Form-1, no ACBs will be payable unless "urgency, impracticability or impossibility prevent the insured from submitting a Form-1."[4] Without notification of an ACB claim, an insurer cannot properly adjust the claim or refuse to pay a benefit. It is inadequate for an applicant to submit anything other than a Form-1 for ACBs and without a Form-1, the applicant has not applied for same.

[20] To this end, Aviva submits that the applicant has been represented by counsel for over five years and there is no evidence to suggest that urgency or impracticability prevented the applicant or his counsel from submitting a Form-1 to it. Further, Aviva submits that by not submitting a Form-1, the applicant has not made a claim for ACBs and has failed to provide Aviva with the opportunity to adjust this benefit or provide a denial. Finally, Aviva asserts that the applicant has not submitted any attendant care expenses to date so there is no dispute.

[21] I find no evidence to dispute Aviva's characterization of this claim. There is no Form-1 in evidence. There is no evidence of correspondence regarding ACBs. There is no written denial of same from Aviva. The applicant does not argue that there was urgency or impracticability. The applicant's submissions on this issue amounted to two sentences stating that Aviva never issued a denial or sent a letter regarding ACBs, but the applicant did not produce his own Form-1 to

[4] *See, for e.g., 16-000372 v. Unica Insurance Inc.*, 2017 CarswellOnt 4272, at para. 39, citing *Kelly v. Guarantee Co. of North America*, 2014 CarswellOnt 11374.

demonstrate he properly applied. Yet, oddly, I note that in his application to the Tribunal, the applicant checked the box that indicates he received a denial of his ACB claim in writing from Aviva. Where Aviva submits no Form-1 was received and no denial was issued and where the applicant did not produce evidence of either, I cannot find that the applicant may proceed with this issue or even that it is properly before the Tribunal.

[22] The applicant also submitted an Automobile Proof of Loss form that was received by Aviva on February 9, 2016, claiming $2,542.50 in property damage. The applicant has placed this into dispute in his application to the Tribunal. Aviva submits, and I agree, that although the applicant has listed this issue in his application, he has failed to provide any particulars regarding this claim and Aviva confirms that it has not received any information on this issue, other than the Proof of Loss form. Furthermore, Aviva submits, and I agree, that the Tribunal is not the correct venue for this dispute as the Tribunal does not hear disputes about damage to vehicles. As such, I agree that this issue cannot proceed.

[23] Next, the applicant's submissions assert he is currently undergoing CAT assessments and his application to the Tribunal indicated that the application concerned a CAT determination. In order to be deemed CAT, or to dispute this designation, the *Schedule* requires the applicant have a medical practitioner complete and submit an OCF-19 form on his behalf indicating that he meets one of the threshold tests for CAT. Aviva asserts that it has never received an OCF-19 form from the applicant and submits that the applicant's attempt to raise this issue without providing an OCF-19 is an attempt to circumvent Aviva's statutory rights under s. 45(3) of the *Schedule*.

[24] I agree. The applicant did not provide an OCF-19 to the Tribunal, or evidence that he has submitted same to Aviva. His submissions only make passing reference to purported CAT assessments in his s. 7 submissions. In turn, Aviva has not conducted its own assessments, nor has it made a determination on CAT under s. 45(3). Accordingly, this issue is premature and should not have been included in the Tribunal application.

[25] Finally, the remaining issue in dispute in the application is the MIG determination. I agree with Aviva that there is no independent basis upon which to challenge a MIG determination. In order to do so, the applicant must dispute the denial of a medical and rehabilitation benefit or other statutory accident benefit because the MIG is not a benefit in and of itself. Where the MIG is put in issue by the applicant, there must be an underlying benefit upon which it may be challenged. As I have determined that all of the issues in dispute were either properly denied or were not properly applied for and where the applicant has missed the limitation period to dispute Aviva's denials, there is no remaining benefit before the Tribunal upon which the applicant's MIG determination may be challenged.

Section 7 of the LAT Act

[26] Despite his position that Aviva's denials were all deficient, the applicant still provided submissions on the applicability of s. 7 of the *LAT Act*. Section 7 affords the Tribunal statutory discretion to extend the limitation period prescribed by the *Schedule* if it is satisfied that there are reasonable grounds for granting such relief. In determining whether to grant an extension, the Tribunal examines four factors: 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.[5] While the Tribunal's discretion to utilize s. 7 remains a live issue before the Divisional Court, until a decision on its application is released, I remain of the belief that the Tribunal has the discretion to extend a limitation period if the factors identified above are satisfied.

[27] Here, however, I would not exercise the Tribunal's discretion to extend the limitation period under s. 7 of the *LAT Act*. I do not find that the applicant had a *bona fide* intention to appeal Aviva's denials within the two-year limitation period prescribed by the *Schedule*. Indeed, the applicant has been represented by counsel since the accident in November 2015 and his application was not submitted until August 21, 2019, after he secured his third representative. While his submissions indicate that he had every intention to appeal Aviva's denials, there was no affidavit evidence provided. There is no evidence of extenuating circumstances that would have prevented the applicant from filing his application or from instructing counsel to do same at any point over the last five years. The absence of critical and routine documentation related to certain claims as well as a lack of correspondence that may have indicated an intent to dispute Aviva's denials is further evidence that he did not have a firm intention from the beginning to appeal.

[28] Further, I find the delay in submitting his application to the Tribunal was rather significant, despite being represented by counsel at all material times post-accident. This is not a case where the limitation period was missed by a few days or even weeks, but rather, the applicant failed to dispute Aviva's valid denials for several years. If the delay itself was not prejudicial enough to Aviva's ability to adjust the file, many of the issues identified in the applicant's application remain premature, improper or are incomplete. The applicant's excuse for the delay seems to revolve entirely around the assertion that one or both of his previous counsel did not follow his instructions to challenge Aviva's denials. In my view, this is not a particular compelling excuse for such a significant delay.

[29] Prejudice almost invariably favours the applicant who may be statute-barred from claiming benefits they may very well need. However, I disagree that there is no prejudice to Aviva. Again, the issues in dispute here were denied primarily in 2015 and 2016 and, with regards to the prescriptions and glasses, up to March 21, 2017. The application was not filed until August 21, 2019 and many elements

[5] *See*, *Manuel v. Ontario (Registrar, Motor Vehicle Dealers Act)*, 2012 ONSC 1492.

of the application are still incomplete to date. This is not a situation where the applicant missed a limitation period by a few weeks. The delay causes prejudice to Aviva because it has not been able to contemporaneously assess the applicant's impairments and adjust the file accordingly for several years, as the applicant still remains in the MIG. In any event, statute-barring the applicant's denied claims will not prejudice the remaining substantive claims identified in the application that are not properly before the Tribunal, being ACBs and CAT.

[30] Finally, while I agree with the applicant that an appeal should be determined on the merits, I find no basis to allow the applicant to proceed with his appeal of the denials on the limited evidence that is before the Tribunal. Indeed, I fail to see, for example, how his purported CAT claim for which he has yet to submit an OCF-19 or receive a determination from Aviva on somehow affords greater merit to his claim for IRB that was terminated in 2016 on the basis of a s. 44 report or the medical benefits that were properly denied by Aviva based on his standing in the MIG, all of which he failed to dispute within the limitation period.

[31] On balance, I find the justice of this case does not warrant what would amount to a significant extension of the limitation period. I find the four factors weigh in favour of Aviva and do not exercise the Tribunal's discretion to extend the limitation period under s. 7 to allow the applicant's appeal of Aviva's valid denials to proceed.

ORDER

[32] The applicant is statute-barred from appealing the denials of his benefit claims under s. 56 of the *Schedule* as he failed to dispute Aviva's valid denials within the limitation period and has not demonstrated that an extension of time under s. 7 of the *LAT Act* is warranted.

Released: January 8, 2021

Jesse A. Boyce
Vice Chair