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

Ontario

Date: 2018-07-18
Tribunal File Number: 17-009243/AABS
Case Name: 17-009243 v Gore Mutual Insurance Company

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:

Z.M.

Applicant

and

Gore Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Christopher A. Ferguson**

APPEARANCES:

Counsel for the Applicant: Georgiana Masgras

Counsel for the Respondent: Heather Kawaguchi

HEARD in Writing: **June 18, 2018**

OVERVIEW

[1] Z.M. ('the applicant"), was injured in an automobile accident on October 5, 2013, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] ("the '*Schedule*").

[2] The applicant applied for benefits from the respondent ("Gore"), and then applied to the Licence Appeal Tribunal ("the Tribunal") when the disputed benefits were denied.

[3] Gore has raised a preliminary issue that could prevent the Tribunal from hearing this appeal. It asserts that the applicant is "statute barred" (explained below) from appealing its refusal to pay claimed income replacement benefits ("IRBs"), and one claimed medical benefit (described below as issue 2), because she failed to commence her appeal within two years of the date that her claim for benefits was denied as required by s. 56 of the *Schedule*.

[4] The respondent has raised another preliminary issue that could preclude the Tribunal from hearing Z.M.'s appeal on a second medical benefit claim. It asserts that the applicant failed to attend a requested insurer's examination (IE) as required by s.44(9)iii. of the *Schedule* and is therefore barred from appealing its refusal to pay a medical benefit described below as issue 3.

[5] In an Order dated May 29, 2018, the Tribunal directed that unless the appeals are found to be barred from proceeding, the parties shall reconvene for a case settlement conference.

PRELIMINARY ISSUE

[6] Gore has raised the following preliminary issues in this matter:

1. Is Z.M. statute-barred from proceeding with her appeal of Gore's refusal to pay IRBs?

2. Is Z.M. statute-barred from proceeding with her appeal of Gore's refusal to pay a medical benefit for physiotherapy recommended in a treatment plan from Spinetec Health Care Solutions, dated submitted March 15, 2015?

3. Is Z.M. precluded from proceeding with her appeal of Gore's refusal to pay a medical benefit for physiotherapy recommended in a treatment plan from Spinetec Health Care Solutions, dated submitted January 18, 2016 because she has failed to attend an insurer's examination under s.44 of the *Schedule*?

[1] O.Reg. 34/10

FINDINGS

[7] Z.M. is not statute-barred from proceeding with her appeal on IRBs. I have decided to extend the limitation period in this case. Her appeal must be heard.

[8] Z.M. is not statute-barred from proceeding with her appeal on the claim for physiotherapy identified in issue 2 above. I have decided to extend the limitation period in this case. Her appeal must be heard.

[9] Z.M. is not precluded from proceeding with her appeal on the claim for physiotherapy identified in issue 3 above. Her appeal may be heard.

REASONS

[10] Under s.56 of the *Schedule*, an appeal of an insurer's denial of a benefit must be commenced within two years after the insurer's refusal to pay the amount claimed. The two years is called the "limitation period".

[11] If an appeal is not filed within the two-year limitation period prescribed by s. 56, then the Tribunal cannot hear it: the appeal is effectively dismissed without a hearing. The appeal is said to be "statute barred."

[12] The parties agree that Z.M. filed an appeal with the Financial Services Commission of Ontario (FSCO) within the limitation period. FSCO was the agency responsible for determining statutory accident benefits at the time.

Issue 1 & 2: Is Z.M.'s appeal for IRBs and physiotherapy statute-barred?

[13] Z.M.'s IRBs were terminated by Gore on March 11, 2015, in an Explanation of Benefits ("OCF-9") on the same date March 11, 2015.

[14] Z.M.'s claim for a medical benefit was denied by Gore in an OCF-9 dated March 30, 2015. A follow up OCF-9 dated May 25, 2015 reiterated the denial. The two OCF-9s were the result of an IE and an addendum paper review to consider information provided by Z.M.

[15] The parties participated in a mediation of issues 1 and 2 at FSCO on August 27, 2015.

[16] Under s.281.1(2) of the *Insurance Act*, which applied at the time of denial, the prescribed limitation period could be extended to a date 90 days after the date of the Report of Mediator on the results of mediation. This extended Z.M.'s limitation period to November 27, 2015.

[17] Z.M. filed her appeal for IRBs with the Tribunal on December 21, 2017.

Extending the Limitation Period – s.7 LAT Act

[18] Gore acknowledges that s.7 of the *Licence Appeal Tribunal Act*[2] (LATA) "has been raised as a possible way to extend a limitation period". However, Gore "strongly disputes that this section may be used to extend the statutory limitation period" set out in the *Schedule* for accident benefits disputes.

[19] Section 7 states:

> Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under s.11 or any other Act, if the Tribunal is satisfied that there are reasonable ground for applying for the extension and for granting relief, it may,
>
> (a) Extend the time for giving the notice either before or after the expiration of the limitation time so limited […]

[20] Gore argues that s.7 is not intended to extend a limitation period because section 7 deals with the "giving of any notice requiring a hearing" and this does not include the filing of an appeal of an insurer's refusal of a claim.

[21] To support its position, Gore refers to the "modern approach to regulatory interpretation", which it submits requires adjudicators to:

i. examine the words of the provision in their ordinary and grammatical sense;

ii. consider the entire context that the provision is located within; and

iii. consider whether the proposed interpretation produces a just and reasonable result.[3]

[22] Following the modern approach, Gore contends that:

i. the ordinary and grammatical sense of "notice" is not "appeal" or "application" – "notice" means "letting someone know";

ii. LATA governs the Tribunal's process and procedures. It "does not encompass the entire process from the start of an Application of an Insured Person". There is no basis to equate "notice" with "appeal" or "application" within LATA. Furthermore, section 2.1 of the Rules of Common Practice defines "appeal" to include any appeal, application or claim before the Tribunal. It does not include the word "notice" and there

[2] S.O. 1990, c.12

[3] Gore draws this direction from *Wawanesa Mutual Insurance Company v. Axa Insurance (Canada)*, 2012 CanLII 592 (ON CA), at para.33-35, which it cites in its submission

is no basis to read the term "notice of hearing" into an "already defined term".

iii. consider whether the proposed interpretation produces a just and reasonable result.[4]

[23] I find that s.7 may be used to extend the limitation period for filing an appeal, because I am governed by the Tribunal's reconsideration decision in *North Blenheim*[5] which effectively states exactly that. At present, pending judicial review of that decision, the issue is settled in favor of applying s. 7 to Z.M.'s appeal.

Does Z.M. meet the criteria for extending the limitation period?

[24] The parties agree that there are four factors for determining whether an extension of limitation period should be granted:

1. the existence of a *bona fide* intention to appeal within the appeal period;
2. the length of the delay and the explanation for it;
3. any prejudice to the responding party (in this case Gore) caused or worsened by the delay;
4. the merits of the appeal.[6]

[25] These four factors act as a guideline – they are not elements that must be met before an extension can be granted, but they act as a guideline to determining the just decision in each case.[7]

[26] Gore contends that the criteria were not met. Z.M. counters that they were.

[27] Gore asserts that Z.M. did not have a *bona fide* intention to file her appeal with the Tribunal within the limitation period.

i. Z.M. brought a motion to reopen her arbitration file with FSCO on September 7, 2016. The motion was granted on May 11, 2016. One of Z.M.'s reasons for reopening with FSCO was that the limitation period would be considered expired with a new application (i.e. to the Tribunal).[8] Gore argues that Z.M.'s motion indicates her intention not to file an appeal with the Tribunal at all.

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[4] Gore cites *Wawanesa Mutual Insurance Company v. Axa Insurance (Canada)*, 2012 CanLII 592 (ON CA), at para.33-35

[5] *A.F. and North Blenheim Mutual Insurance Co. & N.L. and North Blenheim Mutual Insurance Co*., 2017 CanLII 87446 (ON LAT) – submitted by the applicant.

[6] *Howard v. Martin* 2014 ONCA 309 – submitted by both parties.

[7] *North Blenheim* – see above, footnote 5

[8] This reason was given in her FSCO submissions dated May 3, 2017.

ii. The parties reached a settlement agreement on November 13, 2017 and Z.M. cancelled the arbitration hearing on issues 1 and 2, advising FSCO that the file was closed. Z.M. then filed an application with the Tribunal on December 21, 2017. She took no steps to reopen the previous FSCO proceeding, despite being able to do so and despite being aware of the Tribunal's limitation period. Gore argues that "this is the antithesis of having a *bona fide* intention to appeal within the appeal period". Z.M., it argues, "could have and should have pursued her FSCO arbitration had there been a real intention to pursue the benefits."

[28] Gore states that Z.M. has provided no explanation for the lengthy delay in filing her appeal with the Tribunal. There is no explanation for her decision to reopen her claim with FSCO, taking 4 months to do so after it became apparent that settlement could not be finalized.

[29] Gore claims that it would be prejudiced by the delay caused by an extension of the limitation period. The time elapsed makes it harder for Gore to "collect the documentary evidence needed to assess the Applicant's matter". Gore has also been prejudiced by having to go through a series of FSCO processes including a pre-hearing, settlement conference, and motion to reopen – "only to start a brand-new hearing at LAT."

[30] Gore asserts that Z.M.'s appeal is without merit and goes on to argue – with its medical reports cited as evidence – that Z.M. suffered predominantly minor injuries as the result of the accident, and that her primary injury issues arise from a workplace injury for which she filed a WSIB claim, and that she was dismissed from her job for cause.

[31] Z.M. counters that:

i. There is no basis on which to deny her *bona fide* intentions. Her decision to reopen her FSCO file should not be construed as negating her intent to proceed with this matter within the prescribed timelines.

ii. Any delay was not lengthy at all. Her appeal was file with the Tribunal one month after FSCO closed the file on November 13, 2017. This "should be considered prompt and diligent."

iii. There is no prejudice to Gore, because it was actively engaged in handling the disputed issues all along. The appeal is not in any substantive sense "new".

iv. Her appeal has merits as shown by the evidence she enumerates including medical assessments.

[32] My findings after reviewing the submissions are that:

i. I am not persuaded that Z.M.'s decisions with respect to her FSCO files

should be interpreted as signifying a lack of *bona fide* intention to proceed with her appeal within required timelines. My reading of the events depicted in the submissions is that Z.M. considered herself to be continuing one process – regardless of the forum -- which had not yet concluded.

ii. Given the ongoing involvement of both parties to this appeal, I am not prepared to make the length of delay a determining factor in this case; this is because there has been no hiatus in the proceedings that would meet the ordinary meaning of delay.

iii. I am not persuaded that Gore would be materially prejudiced by proceeding with the appeal, because I agree that Gore was actively engaged in handling the disputed issues from the get-go. I do not find it credible that Gore has not obtained all of the documentary evidence it requires to effectively defend Z.M.'s appeal – its submissions and evidence on the merits of her case suggest otherwise. I am not persuaded that Gore's case on the merits of Z.M.'s appeal would be prejudiced by an extension of the limitation period in this case.

iv. I recognize that some prejudice to Gore arises as the result of the time and effort it has invested in FSCO proceedings; however, I cannot see how these outweigh the similar effort made by Z.M. and the severe prejudice to her of having her claims dismissed outright.

v. Z.M.'s submissions include sufficient evidence to persuade me that her appeal has merits. The relative weight of evidence and arguments from the parties should be evaluated by the hearing adjudicator.

[33] Z.M. may proceed with her appeal on issues 1 and 2.

Does FSCO retain jurisdiction over issues 1 and 2?

[34] In its Reply submission Gore raises, for the first time, an argument that the Tribunal should dismiss Z.M.'s appeal under Rule 3.1[9], which states:

3.1 LIBERAL INTERPRETATION

These Rules will be liberally interpreted and applied and may be waived, varied or applied on the Tribunal's own initiative, or at the request of a party, to:

a) Facilitate a fair, open and accessible process and to allow effective participation by all parties, whether they are self-represented or have a representative;

[9] All references to a "Rule" are made to the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)*

b) Ensure efficient, proportional, and timely resolution of the merits of the proceedings before the Tribunal; and

c) Ensure consistency with governing legislation and regulations.

[35] Specifically, Gore contends that:

i. FSCO retains jurisdiction over Z.M.'s appeal (issues 1-2), "and as such this Appeal [*sic*] should be dismissed." Because FSCO has assumed jurisdiction over this matter, the matter cannot be heard at the Tribunal.

ii. It is contrary to Rule 3.1(a)[10], to allow this appeal to proceed because it would be fundamentally unfair to Gore to force it to deal "with two proceedings" in the same matter.

iii. It is contrary to Rule 3.1(b), to allow this appeal to proceed because it would be inefficient given the process already completed at FSCO, where Gore argues, this matter could be easily reopened.

iv. It is contrary to Rule 3.1(c), to allow this appeal to proceed because it would lead to inconsistent results – in turn because FSCO has already been dealing with this dispute.

v. The appeal should be dismissed as frivolous and vexatious and commenced in bad faith, because Z.M. is trying to use two forums to resolve her dispute with Gore.

[36] I am mindful that Z.M. did not have an opportunity to address Gore's new submissions. I decided not to ask Z.M. for a response to them, because I found I did not need her input to determine how to dispose of Gore's new arguments.

[37] I reject Gore's arguments because it simply states them without any explanation or analysis, as if they were self-evident and incontrovertible. They are not. I am not persuaded that proceeding with this matter before the Tribunal would result in unfairness or hardship to Gore or result in efficiency gains that would warrant dismissing Z.M.'s appeal. Frankly I believe it to be in the best interests of both parties to get on with this matter.

[38] Gore also failed to provide me with any argument or precedent to persuade me that Rule 3.1 -- the "Liberal Interpretation Rule" – is meant to be a tool for dismissing appeals outright.

[39] My review of Gore's Reply submission leads me to confirm my view that Z.M. may proceed with her appeal on issues 1 and 2.

[10] All references to a "Rule" are made to the *Licence Appeal Tribunal*, *Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)*

Issue 3: Is Z.M.'s appeal for a medical benefit (physiotherapy) barred for non-attendance at an IE?

[40] Section 44(1) of the *Schedule* governs IEs, and among other things requires the insured person to cooperate with the examination and to submit to all reasonable examinations requested by the examiner.

[41] Section 55(1)2. of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has notified him that it requires an examination under s.44, but the insured person has not complied with that section.

[42] Gore states – without contradiction – that Z.M. missed IEs scheduled for April 11, May 6 and May 16, 2016 in relation to issue 3.

[43] Z.M. counters that she attended an IE to assess this claim on February 20, 2018, and appended a copy of the IE Report sent to her by Gore. Because Gore did not dispute this assertion or the evidence submitted, I accept it as true.

[44] Z.M. may proceed with her appeal on issue 3.

CONCLUSIONS

[45] Z.M.'s appeal of Gore's decision to refuse her claims for IRBs and for a medical benefit as described by issues 1 and 2 may proceed. I have decided to allow an extension under s.7 of LATA.

[46] Z.M.'s appeal of Gore's decision to refuse her claims for a medical benefit as described by issue 3 may proceed. She attended the IE as required by the *Schedule*.

[47] The Tribunal should schedule a case settlement conference with the parties to discuss potential settlement terms and, if necessary, the details of a hearing in this matter.

Released: July 18, 2018

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Christopher A. Ferguson
Adjudicator