



Citation: Fu. v. Pembridge Insurance Company 2022 ONLAT 21-012902/AABS - PI

Licence Appeal Tribunal File Number: 21-012902/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:

Liwei Fu

Applicant

and

Pembridge Insurance Company

Respondent

PRELIMINARY ISSUE DECISION [AND ORDER]

ADJUDICATOR: **Tavlin Kaur**

APPEARANCES:

For the Applicant: Liwei Fu, Applicant
Meral Kesebi, Counsel

For the Respondent: Greg Specht, Counsel
Joan Wakeling, Adjuster

Held in writing

REASONS FOR DECISION [AND ORDER]

OVERVIEW

- [1] The applicant was involved in an automobile accident on **December 27, 2018** 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 and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUE

- [2] Preliminary Issue: The preliminary issue to be decided is:
1. Is the applicant barred from proceeding with hearing because the applicant did not dispute the denial of the following benefit(s) within the 2- year time limitation?
- [3] For the ease of reference, the benefits that are referenced in Adjudicator Reid’s order dated September 6, 2022 are reproduced below:
1. Is the applicant entitled to a non-earner benefit of \$185.00 per week from December 27, 2018 to date and ongoing?
 2. Is the applicant entitled to \$1994.93 for psychological services, proposed by Chao Lun Medical in a treatment plan/OCF-18 (“plan”) dated January 4, 2019?
 3. Is the applicant entitled to \$3698.44 for physiotherapy services, proposed by North Toronto Rehabilitation in a treatment plan/OCF-18 (“plan”) dated January 21, 2019?
- [4] Is the applicant entitled to \$1949.22 for physiotherapy services, proposed by North Toronto Rehabilitation in a treatment plan/OCF-18 (“plan”) dated March 6, 2019?

BACKGROUND

- [5] The applicant was involved in a motor vehicle accident on December 27, 2018. He was a minor at the time of the accident and when his application was submitted to the respondent on January 2, 2019. The applicant applied for a non-earner benefit (“NEB”) and various medical/rehabilitation benefits. The

respondent denied the NEB on January 9, 2019, as well as the treatment plans for medical/rehabilitation denied between January 9, 2019 and March 18, 2019. As a result, the applicant filed an application with the Tribunal on October 22, 2021.

ANALYSIS

- [6] Section 56 of the *Schedule* provides that an application in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed.
- [7] The respondent submitted that the applicant missed the two-year limitation period for all of the benefits in dispute because he did not file his application until October 22, 2021. As such, he should be barred from proceeding with his application before the Tribunal.
- [8] The applicant submitted that his entitlement to the NEB should be considered discovered when he became eligible on his 18th birthday. The applicant turned 18 on September 28, 2020 and became eligible to apply for the NEB on this date. As a result, the date the applicant filed his application with the Tribunal falls well within the limitation period, subject to the rule of discoverability. Moreover, the applicant requested that the Tribunal provide him with an extension regarding the treatment plans in question. He further submitted that his claim has merit and that the treatment plans are reasonable and necessary given the impairments he has sustained as a result of his accident. He is of the view that he is not statute-barred and should be entitled to proceed with his application.

Limitation period for the NEB

- [9] The respondent submitted that the limitation period to appeal a denial starts to run on the date that the benefit is unequivocally denied. In *Sietzma v. Economical*, 2014 ONCA 111 (CanLII), the Ontario Court of Appeal confirmed that the date of denial to be used is the date the insurer clearly and unequivocally refuses to pay the benefit regardless of whether the actual denial is correct. It is the date of the first denial which marks the commencement of the limitation period. The calculation of time does not start over with subsequent denials of the same benefit. Moreover, in *Bonilla v. Prezler*, 2016 ONCA 759 (CanLII), it was found that there is no rolling limitation period. The limitation period is triggered from the initial event of a denial/refusal by an insurer to pay a benefit. The NEB in this claim was unequivocally denied on January 9, 2019. Thus, the applicant had until January 2021 to make an application.

- [10] Moreover, the respondent submitted that when an NEB is applied for and is denied because the applicant does not qualify due to his age, the limitation period still commences from the date of denial. The respondent is relying on *Weathers v. Toronto Transit Commission Insurance Company Ltd*, 2021 CanLII 43538 (ON LAT) ('*Weathers*'). In that case, the applicant applied for a NEB while he was a minor and the benefit was denied as he was not yet of a sufficient age to qualify for the benefit. The respondent notified the applicant that "no benefit is payable until he attains the age of 16".
- [11] The Tribunal noted that the limitation period is triggered by a single event: the refusal of an insurer to pay the benefit. The Tribunal dismissed the application because he did not dispute it within the two years after the denial. The respondent submitted that this is similar to *Weathers* because the applicant applied for a NEB while he was a minor and the benefit was denied as he was not yet of a sufficient age to qualify for the benefit. The applicant was informed of the respondent's refusal to pay
- [12] The respondent further submitted that applicants who are minors are subject to the same rules and timelines under the *Schedule* as those who have reached the age of majority. Minors are not provided with any deadline extensions nor a delay in the calculation of limitation periods by virtue of their being under the age of 18. Moreover, the *Limitations Act* does not apply to the Tribunal. Accordingly, the limitation period contained in section 56 of the *Schedule* started to run on the date of the denials despite the applicant being under the age of 18 when the benefits were denied.
- [13] The applicant submitted that pursuant to s.12(3)(b) of the *Schedule*, persons under 18 are not qualified for the NEB. As a result, the applicant was not eligible to apply for the NEB at the time of his application. The applicant is relying on *Tomec v. Economical Insurance Company*, 2019 ONCA 882, P.V. and *Economical Insurance*, 2020 CanLII12744 (ON LAT) and *Applicant v. TD Home and Auto Insurance Company*, 2020 CanLII 30438 (ON LAT) in support of his case. The applicant submitted that "analogous to *Tomec*, his entitlement to a NEB should be considered discovered when he became eligible on his 18th birthday." Moreover, the application of a hard limitation period was found to be contrary to the purpose of the *Schedule* in *Tomec*.
- [14] Section 36 of the *Schedule* sets out the process for applying for the NEB. There is nothing in this section that sets out a separate process for minors. The word "applicant" is used throughout the section. It should be noted that the word "applicant" is not defined in the *Schedule* or the *Insurance Act*. Therefore, I

interpret the word “applicant” to include minors. The process outlined in section 36 is to be followed by all applicants. It should be noted that there is nothing in this section that makes it a requirement that one must be 18 years old to apply for the NEB.

- [15] The reference to minors is found in Section 12(1)2.i of the *Schedule*. Section 12(1)2.i contemplates individuals that are minors involved in car accidents such as those who are in elementary or secondary school. It states:

The insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies any of the following conditions:

2. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and,

- i. was enrolled on a full-time basis in elementary, secondary or post-secondary education at the time of the accident.

- [15] Even if a minor meets the conditions in Section 12(1) 2.i, section 12(3)(b) of the *Schedule* states that the insurer is not required to pay the NEB before the minor is 18 years of age. However, once the insured turns 18 years old, then the insurer is required to pay as long as the applicant is eligible. In my view, the applicant met the eligibility criteria in the *Schedule* to apply for the NEB at the age of 16 years old when he was a full-time student.

- [16] Moreover, it is a basic principle of statutory interpretation that every word that is found in a statute has been included there for a reason and is intended to have a purpose. There must be a reason as to why the Legislature decided that the insurer does not have to pay the insured until he or she turns 18 years of age. I am required to respect the Legislature’s clear intention.

- [17] I am not persuaded by the applicant’s reliance on *Tomec*. In *Tomec*, the Court found the applicant could not have discovered her claim to the enhanced level of attendant care benefits and housekeeping and home maintenance benefits until she was found to be catastrophically impaired. Therefore, discoverability applied to her claim. I find that it does not in the case before me. This case is distinguishable from *Tomec* because the applicant provided the respondent with the disability certificate and an OCF-10 for the NEB on January 2, 2019. Through this act, the NEB was “discovered”.

[18] Moreover, the applicant does not seem to have a similar late discovery as was the case in *Tomec*. Rather, the applicant was not eligible to receive the NEBs during the limitation period by the operation of section 12(3)(b) and is attempting to characterize becoming eligible (by turning 18) as the discovery of the claim.

[19] As such, I must turn my mind to whether the Tribunal should exercise its discretion pursuant to s. 7 of the *Licence Appeal Tribunal Act*, 1999 S.O. 1999, c. 12 (the “Act”) and grant the applicant an extension to proceed with his application.

Section 7 of the Act

[20] Section 7 of the *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.

[20] These four factors, referred to as the “*Manuel* 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. The onus is on the applicant to satisfy me that the justice of the case favours an extension of the time to appeal.

***Bona fide* intention to appeal within the appeal period**

[21] The applicant submitted that various requests for medical records were made dated April 16, 2021, June 2, 2021, June 3, 2021, June 4, 2021 and September 16, 2021. The letters indicated that the medical records were being requested “for the purposes of the lawsuit” on behalf of the applicant. It is the applicant’s position that this shows his *bona fide* intention to use these medical records to pursue litigation at the Tribunal within the two-year limitation period. The applicant is relying on *Tamayo v. Travelers Insurance*, 2022 CanLII 70282 (ON LAT). In *Tamayo*, the Tribunal found that a fax sent to a treating specialist

requesting the medical file for the purposes of preparing an application demonstrated an intention to pursue a dispute with the Tribunal.

- [22] The respondent submitted that the applicant has not demonstrated a *bona fide* intention to appeal within the time limits by sending a few request letters for non-party records. The applicant's request letters do not indicate the documents were requested in contemplation of filing a Tribunal application, or to dispute entitlement to any benefits. Instead, the letters indicate the documents were requested for "a claim for damages arising from a motor vehicle accident" and for "the purposes of a lawsuit". Moreover, the applicant also sent a letter to the respondent on April 21, 2021 asking for a copy of the complete accident benefits file for the purpose of a tort lawsuit.
- [23] I am not persuaded by the applicant's position. There is nothing in the correspondence sent by the applicant that suggests that he intended to file an application with the Tribunal within the time limits. Moreover, I find *Tamayo* to be distinguishable as in that case, the fax mentioned the "Application for an Injured Person", which is the name of the application form that applicants must file with the Tribunal. The correspondence here refers to a tort matter, not an accident benefits claim with the Tribunal. Therefore, I did not find a *bona fide* intention to dispute the decision before the Tribunal.

Length of delay

- [24] The parties have differing views with respect to the limitation period. However, on March 20, 2020, *O. Reg. 73/20* was enacted. This regulation suspended limitation periods retroactively from March 16, 2020 and was repealed on September 14, 2020. This legislation was in force for 183 days. As such, a limitation period that began running before March 16, 2020 can be extended by 183 days.
- [25] This was affirmed in *McAuley v Canada Post Corporation*, 2012 ONSC 4528, where the Ontario Superior Court of Justice found that *O. Reg. 73/20* extended all running limitation periods by 183 days. The limitation period for this application started running before March 16, 2020 and can be extended by 183 days.
- [26] The applicant submitted that the length of the delay is not significant. It was submitted that the application was filed on October 22, 2021. The applicant stated that "there is [sic] delay of 108 days, 91 days and 47 days for each respective treatment plan."

- [27] The respondent submitted that allowing the late appeal of denied benefits undermines the certainty and reliability of the regime itself and is inherently prejudicial to the respondent. It is the onus of the applicant to satisfy the Tribunal that the facts and circumstances of the case justify the discretion to extend the limitation period. The length of the delay is excessive.
- [28] Even though *O. Reg. 73/20* extended the limitation period, I find that the applicant has not proffered any reasons as to why there was still such a delay in submitting the application. I find the length of delay excessive, especially considering that the applicant was represented by legal counsel at the time. As such, I am not persuaded by the applicant's position.

Prejudice

- [29] The applicant submitted that there is no significant delay that would cause any prejudice to the respondent. However, the dismissal of the applicant's claim would significantly prejudice the applicant. Denying the applicant the ability to argue entitlement to his claims would prevent him from recovering medical benefits he deserves.
- [30] The respondent submitted that allowing a late appeal of denied benefits is prejudicial and incurable. I do find the delay to be long and without any explanation from the applicant. I find that there is some degree of prejudice to the respondent to have to defend its denial that is well over the two-year mark.

Merits of the case

- [31] The applicant submitted that "this is not a case which has little or no chance of success." The applicant said that he developed serious physical and emotional difficulties as a result of the accident. The applicant submitted that his family physician, Dr. Jeanne Huo, confirmed that he still experiences insomnia, lower energy and depressive symptoms as a result of the accident on December 27, 2018. Dr. Huo advised him to go to counselling and psychotherapy.
- [32] The respondent submitted that the applicant returned to his regular activities of daily life and "found treatment to be a waste of time". As such, there does not appear to be a *prima facie* case that there is any merit to his appeal for the NEB or entitlement to the various treatment plans.
- [33] I am not persuaded by the applicant's position. Dr. Huo's notes found in Tab 15 of the applicant's submissions do not make any reference to the subject accident

as suggested by the applicant. There are notations about anxiety and insomnia, but there is nothing to tie these conditions to the subject accident.

- [34] As noted above, all four factors do not need to be satisfied as long as the justice of the case requires granting of the extension of the limitation period under s. 7 of the *Act*. On a balance of probabilities, I find that the applicant has not persuaded me that he had a *bona fide* intention apply to the Tribunal within the applicable period. He has not explained the length of the delay. I find there is some prejudice to the respondent. Furthermore, I am not satisfied that his appeal application has merit. As a result, I find that the justice of the case does not warrant an extension of the limitation period.

ORDER

- [20] For the reasons above, I find that the applicant is statute-barred from proceeding before the Tribunal with his application. The application is dismissed.

Released: December 21, 2022

**Tavlin Kaur
Adjudicator**