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

Tribunal File Number: 17-002867/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:

S.S.

Applicant

and

Economical Mutual Insurance Company

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR:	**Sandeep Johal**
APPEARANCES:	
For the Applicant:	Nigel G. Gilby, Counsel
	Marinus Lamers, Counsel
For the Respondent:	Lisa Armstrong, Counsel
	Shalini Thomas, Counsel
Heard In-Writing:	**February 12, 2018**

OVERVIEW

[1] The applicant was injured in an automobile accident on July 29, 2009 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*[1] *(the "Schedule").*

[2] The applicant applied for benefits that were denied by the respondent including attendant care benefits ("ACB") and housekeeping/home maintenance benefits ("Housekeeping"). The applicant disagreed with these denials and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

[3] The respondent raised a limitation issue that the applicant is precluded from filing an application with the Tribunal with respect to ACB's and Housekeeping as the applicant did not commence the application within two years of the denial.

PRELIMINARY ISSUE

[4] The preliminary issue to be decided as per the case conference order dated July 19, 2017 is:

i. On the facts of this case, is the applicant statute-barred from claiming an attendant care benefit and a housekeeping and home maintenance expenses as they failed to dispute the respondent's denial of benefits within two years of the denial date?

RESULT

[5] The applicant's claim of the ACB and Housekeeping is out of time and the applicant is statute barred from bringing an application for ACB's and Housekeeping to the Tribunal.

APPLICANT'S MOTION TO STRIKE THE RESPONDENT'S REPLY SUBMISSIONS

[6] The applicant filed a motion in writing to the Tribunal on February 6, 2018 to strike the respondent's reply for the purposes of this written hearing as the applicant submits that the reply was not proper and it addresses arguments which should have been raised in the respondent's original submissions. The applicant further submits that the respondent did not "put its best foot forward"[2] on this hearing to dismiss the claim as being statute barred.

[7] The applicant's motion is denied. All the parties' submissions will be considered for the purpose of the preliminary issue hearing. The rules of evidence are relaxed in a Tribunal setting and the respondent replied to the issues raised by the applicant in his submissions and in order to ensure a just, proportional and

[1] O. Reg. 403/96.
[2] Michaud et al v. State Farm Mutual Insurance Company, FSCO A11-004496 and A11-004497.

timely resolution in accordance with the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016) all the submissions will be considered .

ANALYSIS

Parties' Positions

[8] The applicant submits the respondent cannot raise a limitation defence for the higher monetary tier of ACB and for Housekeeping expenses prior to the applicant having been found to have suffered a catastrophic impairment. Further, because the respondent paid the higher tier of ACB and also paid Housekeeping expenses after the applicant was found to have suffered a catastrophic impairment therefore, the respondent cannot now resurrect the prior limitation period.

[9] In support of his position, the applicant relies on the denial letter from the respondent as being unclear and ambiguous, the statutory interpretation of the *Insurance Act* and the *Schedule,* a Charter[3] argument and the principle of discoverability.

[10] The respondent submits the applicant is statute barred from proceeding to a hearing for ACB's and Housekeeping because the applicant failed to commence the dispute resolution process within two years of the limitation period established by the *Schedule* and the *Insurance Act* based on its denial letter sent to the applicant on October 4, 2011.

Is the denial letter of October 4, 2011 unclear and ambiguous?

[11] The applicant further submits the denial letter of October 4, 2011 was not in relation to catastrophic benefits and was misleading with respect to the dispute resolution process as the respondent did not provide an Explanation of Benefits (OCF-9) form and the references to the *Schedule* were from the 2010 version of the *Schedule* and not the 1996 version for which this accident applies.

[12] I disagree with the applicant for the following reasons, the respondent's letter dated October 4, 2011 met the requirements as outlined in the *Schedule*[4] as it clearly and unequivocally communicated to the applicant that his ACB would no longer be payable effective immediately and his Housekeeping would no longer be payable after a certain date. The respondent then outlined the applicant's rights to dispute the refusal while identifying the time limits within which to do so and as a result, I find the denial to have been in compliance with the principles as set out in *Smith v Co-operators General Insurance Company*[5] *a*nd the *Schedule*.

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[3] S. 15 of the Canadian Charter of Rights and Freedoms

[4] S. 49 of the *Schedule*

[5] Smith v Co-operators General Insurance Company [2002] 2 SCR 129 [*Smith v Co-Operators*]

Does the reference to the sections from the 2010 version of the *Schedule* in the denial letter make the denial incorrect and ambiguous?

[13] Even if the sections of the *Schedule* from the denial were incorrect, I do not find the incorrect section numbers to invalidate the denial as the respondent is not held to a standard of perfection.[6]

[14] The denial letter dated October 4, 2011 states that the applicant does not meet the definition for a catastrophic impairment listed in Section 3. 2.(2)(d)(I) of the *Schedule* and with respect to the denial of the attendant care benefit, the letter states "The Attendant Care Benefit is not payable for expenses incurred more than 104 weeks after the accident per s.20.(2) of the SABS, as such this benefit is stopped effective immediately."

[15] In my opinion and based on *Smith v Co-Operators* regardless of whether the sections were incorrect, there is no ambiguity with respect to whether or not the benefit is being denied. It is clear the benefit is being terminated and the letter goes on to outline the dispute resolution process and the time limits that govern that process. As a result, my finding is that the denial letter complies with *Smith v Co-Operators* and it is a valid denial which starts the limitation clock.

Does a subsequent payment negate a previous denial?

[16] The applicant submits that the respondent's subsequent conduct in facilitating and determining the quantum and payment of retroactive and ongoing ACB and Housekeeping negates any prior limitation period.

[17] I agree in part that a subsequent payment may negate a prior denial, however in the current case, the applicant's claim was already statute barred and I do not find that a subsequent payment can extend a limitation period longer than what has been allowed for under the *Insurance Act* and the *Schedule*.

[18] I distinguish the cases submitted by the applicant in support of his position[7] from the current case before me because in *T.N.* and *Rudnicki* the payments were made by the insurer while the limitation period was still running and not expired. In contrast to this case where the limitation period had already expired and according to *The Law of Limitations* authority submitted by the applicant, an acknowledgment or part payment **cannot revive a right that has been extinguished**. (Emphasis added).[8]

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[6] Turner v. State Farm Mutual Automobile Insurance Company, [2005] OJ NO 351, 2005 CanLii 251 9ONCA)

[7] T.N. v. Personal Insurance Company of Canada, FSCO A06-00399; ("*T.N.*") Rudnicki v. Certas Direct Insurance Company, FSCO A00-00930 April 19, 2001 ("*Rudnicki*")

9 Graeme Mew, The law of Limitations, 2d ed (Markham: LexisNexis Canada Inc. 2004) at page 115.("*The Law of Limitations*")

Limitation periods

[19] The reconsideration decision of Executive Chair, Linda P. Lamoureux in *G.P. and Aviva Insurance Company of Canada*[9] noted that "as long as the principles and requirement for a proper notice are adhered to…the *Schedule's* time limits cannot be set aside."[10] In this reconsideration, The Executive Chair went on summarize the relevant principles regarding limitation periods and an insurer's refusal to pay benefits:

> *While the Tribunal is not bound by FSCO jurisprudence, I found the following principles, the cases from which they arise, persuasive and worth highlighting*[11]*:*
>
> - *The notice provided to an applicant communicating an insurer's decision to terminate or refuse accident benefits must be clear and unequivocal, and permit an applicant to decide whether or not to challenge the denial: Turner v State Farm Mutual Insurance Company; Zeppieri v. Royal Insurance Co. of Canada; Monks and Dominion of Canada General Insurance Company;*
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> - *The notice to an applicant of an insurer's refusal to pay benefits must also contain, in straightforward and clear language, directed towards an unsophisticated person, a description of the most important points of the dispute resolution process and the relevant time limits that govern the entire process; Smith v. Co-operators General Insurance Co. ("Smith and Co-operators"); Sietzema v. Economical Mutual Insurance Company("Sietzema");*
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> - *The refusal to pay benefits may be premature and may include benefits the applicant has yet to apply for or claims to have yet to crystalize: Bonaccorso v. Optimum Insurance Company Inc. ("Bonaccorso"); Katanic v. State Farm Mutual Insurance Company ('Katanic") and Sietzema; and*
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> - *Re-applying for benefits (due to a relapse or fresh medical evidence) more than two years after an initial refusal will not trigger a new limitation period: Wadhwani v. State Farm Mutual Automobile Insurance Company ("Wadhwani'); Haldenby v. Dominion of Canada General Insurance Co. ("Haldenby").*

[20] I agree with the above principles and find that they apply to the applicant in the present case. With respect to the case before me, the letter dated October 4, 2011 is clear in that the respondent was denying attendant care benefits and

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[9] G.P. and Aviva Insurance Company of Canada, 2017 CanLii 7739 (ON LAT)
[10] *Supra* note 10 at para 40.
[11] *Supra* note 10 at para 22.

housekeeping expenses and there was straightforward and clear language that set out the dispute resolution process and the relevant time limits that govern the entire process.

Can the respondent prematurely deny benefits?

[21] The applicant submits the respondent is not able to deny catastrophic impairment benefits prior to the applicant having been found to have suffered a catastrophic impairment.

[22] The applicant takes the position that once an applicant is found to be catastrophically impaired he is entitled to apply for benefits such as ACB and Housekeeping retroactively from the date of the catastrophic determination. I agree with the applicant in part. The applicant may be entitled to retroactive benefits, however there is no provision that allows for an applicant to make a further application for housekeeping and home maintenance benefits after termination. Post-104 housekeeping is not a different benefit.[12] I would take that one-step further and apply the same principle to a post-104 week ACB. A post-104 week ACB is not a separate benefit to be applied for once a catastrophic determination has been made. The only difference is quantum and duration however, the test and the timelines for claiming the benefit remain the same.

[23] I find myself bound by the Courts' jurisprudence that the respondent may deny benefits prematurely that the applicant has yet to apply for, or for claims that have yet to crystalize.[13] In my opinion that would include applying for the same benefits such as ACB's which would now be at a higher quantum because of the catastrophic determination.

[24] Lastly, re-applying for the benefit as the applicant has done in this case because of fresh medical evidence that the applicant has now been determined to have catastrophic injuries as defined in the *Schedule* does not trigger a new limitation period.[14]

[25] Once a valid denial has been provided there is nothing in the *Insurance Act* or the Schedule that requires the respondent on termination of a benefit, to give the applicant a further notice advising that he or she may have a right to renew a claim for the benefit that had previously been denied[15] even if the applicant is subsequently determined to have suffered a catastrophic impairment.

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[12] Somerville v State Farm Mutual Automobile Insurance Company FSCO A12-006767, September 11, 2014 page 6

[13] Katanic v. State Farm Mutual Automobile Insurance Company, 2013 ONSC 5103 (CanLii) and Sietzema v. Economical Mutual Insurance Company, 2014 ONCA 111 ("*Sietzema*")

[14] Haldenby v. Dominion of Canada General Insurance Co. (2001) O.J. No. 3317 (Ont. C.A.(W.L.)

[15] Sietzema v. Economical Insurance Company, 2014 ONCA 111, *Sietzema* at para. 15.

STATUTORY INTERPRETATION

[26] The applicant submits that section 281.1 of the *Insurance Act*[16] is ambiguous as regards to its interpretation and application. In my view there is no ambiguity.

[27] Section 281.1 of the *Insurance Act* provides:

> A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed.

[28] The applicant applied for benefits, those benefits were later terminated by way of a letter dated October 4, 2011 which was in accordance with the principles laid out from the *Smith v. Co-operators*[17] case making it a valid denial and the applicant did not dispute the denial in accordance with section 281.1 of the *Insurance Act* within two years after the insurer's refusal to pay.

CHARTER ARGUMENT

[29] The applicant submits that the respondent's interpretation of the limitation provision is contrary to section 15 of the Charter of Rights and Freedoms, the right to equality without discrimination as the respondent's interpretation creates two classes of catastrophically injured accident victims. One being those whose catastrophic determination can be made in close proximity to the time of the motor vehicle accident and those who catastrophic determination is delayed. For those whose determination is delayed, those catastrophically injured accident victims would exacerbate their disadvantage as they would be denied enhanced benefits which would be available for those with a catastrophic determination in close proximity to the date of the accident.

[30] Rule 11 of The Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, has specific requirements that must be followed in the event of a constitutional question being raised. The least of which is to serve the Attorney General of Canada and the Attorney General of Ontario, the other party and the Tribunal with a notice that a constitutional issue is being raised.

[31] I find that the formal requirements in raising a constitutional question has not been complied with by the applicant and it would be inappropriate to engage in an analysis on this issue when the issue is not properly before any of the parties as required by Rule 11.[18]

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[16] Historical version for the period May 5, 2008 to December 14, 2009.
[17] *Supra*, Note 6 *Smith v Co-Operators*
[18] Rule 11 of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016)

DISCOVERABILITY

[32] The applicant submits that he was unable to apply for the higher tier of benefits because it was not available to him until he discovered that he met the criteria for catastrophic injuries. I do not accept the applicant's submission for the following reasons.

[33] The applicant submits the case of *Peixeiro v. Haberman*[19] which I do not find persuasive or binding as the case was with respect to a tort action and a cause of action under the *Highway Traffic Act* and not statutory accident benefits. Furthermore, the applicant submits that the common law principle of discoverability was applied in the case of *Peixeiro v. Haberman* and now has statutory support in the *Limitations Act* that states a claim is discovered when a proceeding would an appropriate means to seek to remedy it.[20]

[34] The Divisional Court in *Kirkham v. State Farm*[21] established that the principle of discoverability is an approach that is acceptable in court actions and does not apply in the scheme of statutory accident benefits.[22]

[35] In the alternative, the applicant submits the *Kirkham* case was wrongly decided, however the Tribunal does not have the statutory authority or inherent jurisdiction to overrule the courts and the Divisional Court's ruling in *Kirkham* is binding on the Tribunal.

[36] The respondent submits that the limitation period in the *Insurance Act* and the *Schedule* is not triggered by the discoverability of a catastrophic impairment. It is triggered by an insurer's refusal to pay a benefit. I agree with the respondent.

[37] In the FSCO case of *Ramalingam and State Farm Mutual Automobile Insurance Company*[23] the insured argued that the *Limitations Act* and the discoverability of the requisite facts triggered the commencement of the limitation period. This argument was rejected by the Arbitrator in that case and I agree with the opinion that sections 279 to 283 of the *Insurance Act* form a complete scheme for the resolution of all disputes concerning benefits and the doctrine of discovery and the *Limitations Act* do not apply.[24]

[38] For the reasons outlined above, I find the respondent denied the ACB's and Housekeeping by way of a letter dated October 4, 2011 and the applicant did not comply with the two year limitation period to dispute the denial and the applicant is precluded from bringing an application to the Tribunal for ACB's and

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[19] Peixeiro v. Haberman, [1997] 3 S.C.R. 549

[20] *Limitations Act* 2002, S.O. 2002 c. 24 Section 5(1)(a)(iv)

[21] Kirkham v. State Farm, 1998 OJ No 6459

[22] S.T. and Economical Mutual Insurance Company, ONLAT 16-003034/AABS, September 7, 2017 at para 56.

[23] Ramalingam and State Farm Mutual Automobile Insurance Company, FSCO A08-001571, June 4, 2010 ("*Ramalingam")*

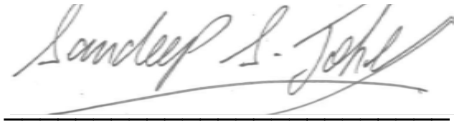
[24] *Supra,* note 26, *Ramalingam* page 6.

Housekeeping.

ORDER

[39] The application for ACB's and Housekeeping is dismissed.

Released: August 10, 2018



Sandeep Johal, Adjudicator