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: 17-003419/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.S.

Applicant

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: **Meray Daoud**

APPEARANCES:

Counsel for the Applicant: **Robert G. Plate**

Counsel for the Respondent: **Alexander Hartwig**

HEARD: **Written Hearing: October 18, 2017**

Overview:

[1] The applicant, M.S., was involved in an accident on June 10, 2010 and sought benefits from the respondent, pursuant to the provisions of the *Statutory Accident Benefits Schedule – Effective November 1, 1996*[1] (the "*Schedule*"). The applicant's claim for statutory accident benefits was denied by the respondent and the applicant filed an application with the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") to resolve the matter.

[2] This preliminary issue hearing was scheduled at the case conference which took place on August 28, 2017.

Preliminary Issue:

[3] The issue to be decided at this hearing is:

1. Is the applicant precluded from proceeding with a claim for income replacement benefits, as she failed to dispute the denial of the benefit within the two year limitation period?

Result:

[4] The applicant is statute barred from disputing the denial of the income replacement benefit.

[5] The respondent is not entitled to its costs for this proceeding.

BACKGROUND:

[6] By way of background, a brief synopsis of the facts and correspondence which are relevant to this case will follow.

[7] At the time of the accident the applicant was working at Grand River Hospital (the "full-time" job), as well as Sunnyside Home-Regional Municipality of Waterloo (the "part-time job").

[8] The applicant was unable to return to her part-time job following the accident and applied for income replacement benefits (IRBs).

[9] IRBs were paid to the applicant at the rate of $400.00 per week for the period of June 17, 2010 to March 1, 2011.

[10] A Disability Certificate (OCF-3), dated August 31, 2010, completed by Dr. Kolev, was submitted to the respondent, which suggested the applicant could return to her part-time job on modified duties.

[1] O. Reg. 403/96.

[11] A letter sent to the applicant by the respondent, dated September 31, 2010, acknowledged receipt of the OCF- 3 and asked the applicant whether she could indeed return to her part-time employment on modified duties.

[12] The respondent sent a letter dated November 19, 2010 to the applicant notifying her that she was required to attend assessments under s. 35, 37 and 22 of the *Schedule.*

[13] In a letter dated December 13, 2011, the respondent wrote to the applicant confirming that she had advised the respondent that she was unable to complete her full-time job along with her part-time job. Within the same letter, the respondent requested a new OCF-3 regarding her inability to work at her full-time job. The respondent also notified the applicant that the previously scheduled assessments would proceed as scheduled.

[14] The insurer's assessments took place on January 7 and 25, 2011.

[15] By way of letter and Explanation of Benefits (OCF-9) dated February 15, 2011, the respondent notified the applicant that she was no longer entitled to the IRB she was receiving, effective March 1, 2011.

[16] The respondent sent a letter to the applicant dated April 20, 2011, with respect to her claim for IRBs for her full-time job. As the respondent was of the understanding that the applicant was receiving 100% of her salary for the time she missed at her full-time job, the respondent requested a Declaration of Post-Accident Income & Benefits (OCF-13) and an Employer's Confirmation Form (OCF-2), to confirm.

[17] A letter and OCF-9 dated June 14, 2011 were sent to the applicant by the respondent, advising that it received the OCF-2 from her full-time employer which confirmed she was receiving $1,251.00 per week from her collateral carrier. The respondent notified the applicant that as such, no IRBs were payable for the period of December 20, 2010 to January 17, 2011.

[18] The respondent wrote to the applicant via letter dated September 20, 2011 advising that they had been notified that her treatment was completed and if this was not that case, she had 10 business days to respond, after which her file would be closed. The respondent closed the applicant's file on October 5, 2011, as it had not received a response from the applicant.

[19] The respondent received a letter from applicant's counsel dated February 17, 2015 requesting a copy of the applicant's file.

[20] An application dated May 24, 2017 was filed with the Tribunal and a letter dated July 12, 2017, from the applicant's counsel, was sent to the Tribunal requesting to add IRBs for the period April 15, 2013 to date and ongoing as an issue in dispute.

ANALYSIS:

[21] The respondent claims that, under s. 51 of the *Schedule*, the applicant had two years to dispute the IRB denial and this had run two years from the February 15, 2011 denial.

[22] S. 7 of the *Licence Appeal Tribunal Act*[2] allows the Tribunal to extend a limitation period if there are reasonable grounds to do so.

[23] The applicant submits that the limitation period for this benefit had not run based on two arguments. I will address each of these.

[24] The first argument, which the applicant put forth, is that the limitation period has not run because the respondent violated s.37 of the *Schedule.*

[25] S.37(1)(a) of the *Schedule* states:

> ***37.*** *(1) If an insurer wishes to determine if an insured person is still entitled to a specified benefit, the insurer,*
> *(a) shall request that the insured person submit within 15 business days a new disability certificate completed as of a date on or after the date of the request.*

[26] Specifically, the applicant submits that the respondent did not request a new OCF-3 prior to notifying the applicant that it required her to attend insurer assessments in its letter dated November 19, 2010.

[27] The applicant further submits that the respondent only requested a new OCF-3 within their letter dated December 13, 2010 and this letter made it clear that the assessments were going to proceed without the new OCF-3.

[28] The applicant relies on the cases of *Roger v. The Personal*[3] (*Roger*) and *Yogesvaran v. State Farm*[4] (*Yogesvaran*) for the proposition that a failure to obtain a new OCF-3 prior to scheduling s. 42 assessments puts the applicant at a significant disadvantage and invalidates any termination of benefits by the respondent.

[29] The applicant further submits that the entire purpose of requesting a new OCF-3 prior to the assessments taking place, is to ensure a change in the applicant's medical condition, if any, is noted.

[30] The applicant states that the respondent's breach of s. 37(1)(a) is fundamental and is not a mere technical breach.

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[2] S.O. 1999, c. 12, Sched. G
[3] *Roger v. The Personal Insurance company of Canada* 2014 ONSC 1964, (Ont. SCJ)
[4] *Yogesvaran v. State Farm Mutual Automobile Insurance Company* 2009 CarswellONT 7980 (FSCO Arb)

[31] The applicant also submits that the respondent further breached s. 37(5) of the *Schedule*, as it did not provide a copy of the assessment reports relied upon, to the applicant's family physician, Dr. Mirza.

[32] In their submissions, the respondent does not deny that a "new" OCF-3 was not specifically requested in the letter of November 19, 2010, wherein it notified the applicant of the requirement to attend insurer's assessments.

[33] The respondent submits that it was already in possession of a "new" OCF-3, that of Dr. Kolev dated August 31, 2010.

[34] The respondent relies on the case of *Yogesvaran*, where Arbitrator Miller discussed what was meant by a "new" OCF-3 in the *Schedule.* Arbitrator Miller states that when an insurer can request an OCF-3 is dependent on the facts of the case and that the word "new" within s.37(1)(a), in her view, means an up to date OCF-3.

[35] In *Yogesvaran,* the arbitrator found that if there is a material change in the insured's medical condition since the last OCF-3 and the respondent did not request a updated OCF-3, that the insured would be put at a disadvantage in that the assessment would be done without taking this material change into consideration. The respondent submits that this was not the case here.

[36] The respondent submits that the OCF-3 was dated August 31, 2011 and provided for a disability period of four to eight weeks which would make it valid until October 26, 2010 and that the letter requesting the assessment was dated less than 4 weeks from that date.

[37] The respondent further submits, if the August 31, 2010 OCF-3 is not considered a "new" OCF-3 that at most, the failure to request a "new" disability certificate was a minor technical breach and did not cause the applicant any prejudice.

[38] Within its submissions, the respondent states that there was no evidence of a material change in the applicant's condition between August 31, 2010 and November 19, 2010 to say that a new disability certificate would have made a difference.

[39] The respondent also submits that in the appeal decision of *Yogesvaran,* Delegate Blackman found that while requesting a OCF-3 is mandatory under s. 37(1)(a), there are no specific consequences set out in the *Schedule* for non-compliance with this section.

[40] Although I do not condone the respondent's non-compliance with s.37, the *Schedule* indeed does not set out consequences for such a breach. I cannot arbitrarily impose a consequence as extreme as extending the limitation period,

particularly in this circumstance, where doing so would highly prejudice the respondent.

[41] Although, in some fact scenarios, there may be enough evidence to warrant an extension of the limitation period due to the non-compliance of s. 37, however this is not one of them. An extension of the limitation period at this juncture would put the respondent at a grave disadvantage. The respondent would have lost the opportunity to have further assessments completed and productions which covered the last 6 years provided to them, in order to have adjusted the file fairly for this time period. Also, the test for entitlement for IRBs changed post 104 weeks, and again, the respondent did not have an opportunity to properly assess the applicant with respect to this. I cannot say that the respondent's breach of s. 37 at the time put the applicant at such a disadvantage.

[42] It is also worth noting that the application to the Tribunal for the denial of the income replacement benefit was made over 6 years after receiving the denial. I have no explanation for such a delay by the applicant. Yet, I need not delve into this further.

[43] I am not persuaded by the applicant's argument that the respondent's breach of s.37 was so material as to prejudice the applicant. I have no evidence before me that the presence of a "new" disability certificate would have shown a material change in the applicant's medical condition. This is especially the case here, since the August 31, 2010 OCF-3 would have been valid up until just weeks before the November 10, 2010 request for assessments.

[44] The applicant could have raised the issue of the respondent's non-compliance long before the application to the Tribunal, at which time, the respondent may have had the opportunity to respond to this and remedy the deficiency, however, this was not done. On the contrary, no communication was received by the respondent from the applicant for years between the respondent's letter dated October 5, 2011 and the letter sent to the respondent by the applicant's representative dated February 17, 2015. Further, no explanation was provided for this delay.

[45] The second argument presented by the applicant is that the denial of the income replacement benefits was not clear and unequivocal and therefore invalid

[46] The applicant submits that the denial of February 15, 2011 was not clear and unequivocal because the respondent sent a letter requesting further information with respect to income and employment after the initial denial.

[47] The applicant further submits that the initial denial was "diluted" by the respondent requesting further information by way of letter dated April 20, 2011 as well as sending the applicant a further OCF-9 dated June 14, 2011.

[48] The applicant submits that she believed that her benefits were still being considered after the initial denial due to receiving these documents, and as such, continued to submit a Declaration of Post-Accident Income (OCF-13) and Employer's Confirmation (OCF-2).

[49] The applicant argues that as the denial was invalid, the limitation period had not commenced.

[50] The respondent submits that the February 15, 2011 denial of income replacement benefits was in relation to the applicant's part-time job, while the letter dated April 20, 2011 and the OCF-9 dated June 14, 2011 related to her full-time job.

[51] The respondent further points out that the OCF-9 dated June 14, 2011 clearly states that no IRB's are payable in relation to her full-time job, for the period of December 20, 2010 to January 17, 2011.

[52] Further, the respondent submits that even if the documents dated April 20, 2011 and June 14, 2011 were unclear, which it denies, this denial with respect to the IRB claim for her full-time job, does not invalidate the denial of February 15, 2011 which was for the IRB claim for her part-time job.

[53] I am in agreement with the respondent. The two documents dated April 20, 2011 and June 14, 2011, which were submitted in evidence for this hearing, make it clear that they are in relation to a claim for IRBs for her full-time job.

[54] The denial that is to be considered on its merits is the one dated February 15, 2011. The letter and OCF-9 sent after this denial do not affect the contents of the February 15, 2011 letter.

[55] With respect to the adequacy of the denial in question, dated February 15, 2011, it is worth noting that the Court of Appeal decision in *Sietzema v. Economical*[5] ("*Sietzema*"), held that an insurer's denial of a benefit, even if it is legally incorrect, will trigger the two-year time limitation. If the applicant believes that the denial was improper, they had a right to dispute whether it was proper or not within the two year period.

[56] Notwithstanding this, I find that the denial of the income replacement benefit dated February 15, 2011 was proper as it was clear and unequivocal. This OCF-9 clearly stated the specified benefit being denied, the reason for denial, the date the denial took effect, as well as set out the applicant's right to dispute and the limitation period.

[57] As a result of the above, the two year limitation period on the denial of the income replacement benefit began to run on February 15, 2011 and was up on February

[5] *Sietzema v Economical Mutual Insurance Company*, 2014 ONCA 111 (CanLII), 118 OR (3d) 713.

15, 2013. As such, the applicant is statute barred from disputing the income replacement benefit denial.

Costs:

[58] In its submissions, the respondent sought costs for this proceeding.

[59] Although the Tribunal has the authority to award costs to a party, under rule 19.1 of the Tribunal's *Rules of Practice and Procedure*, I do not find that the respondent provided evidence that the applicant acted unreasonably, frivolously, vexatiously or in bad faith, *within this proceeding*. Accordingly, I find that the respondent is not entitled to costs.

Order:

[60] The application is dismissed. The respondent is not entitled to costs.

Released: April 13, 2018

Meray Daoud
Adjudicator