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: S.S. vs. RSA Insurance 2020 ONLAT 19-005229/AABS

Released Date: 06/23/2020
File Number: 19-005229/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

RSA Insurance

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Nicholas Mester

For the Respondent: Ramandeep Pandher

HEARD: **Via written submissions**

OVERVIEW

[1] S.S. was involved in an automobile accident on June 25, 2016, and sought benefits from the respondent, RSA, pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "*Schedule*"). RSA denied two treatment plans on the basis of its determination that S.S. suffered predominantly minor injuries as a result of the accident and, therefore, was subject to treatment within the Minor Injury Guideline ("MIG").

[2] To that end, RSA scheduled s. 44 Insurer's Examinations ("IEs") to determine whether the treatment plans were reasonable and necessary and whether S.S.'s impairments required treatment outside of the MIG limits. S.S. took issue with the IEs, arguing that they were not reasonable and necessary so long as RSA maintained its position that she was in the MIG. S.S. refused to attend the IEs and submitted medical records to RSA that she believed proved her impairments required treatment beyond the MIG. In a letter dated November 24, 2016, RSA notified S.S. that, because of her refusal to attend the s. 44 IEs, it would maintain its denials and its position that the MIG applied.

[3] By all accounts, there was no further correspondence between the parties until S.S. filed her application for dispute resolution with the Tribunal on April 30, 2019, appealing the denial of the two treatment plans. There is also no dispute that S.S.'s application to the Tribunal was filed over six months past the expiration of the two-year limitation period prescribed by the *Insurance Act* following RSA's denial.

[4] At the case conference, RSA raised several preliminary issues, only two of which remain. Despite the fact that RSA raised the preliminary issues, S.S. provided initial submissions on why she should be permitted to proceed with her application. She urges the Tribunal to extend the limitation period based on s. 7 of the *Licence Appeal Tribunal Act ("LAT Act")*, and further submits that the medical documentation of her pre-existing impairments submitted to RSA is *prima facie* evidence that she required treatment beyond the MIG.

ISSUES

[5] The preliminary issues in dispute are as follows:

a. Is the applicant precluded from pursuing this application because of the expiration of the limitation period to make this application?

b. Is the applicant disentitled to compensation for any issue in this application because of s. 55(1)2 of the *Schedule*, as the respondent alleges the applicant did not attend an examination under s. 44 of the *Schedule*?

RESULT

[6] I find S.S. is precluded from pursuing her current application at the Tribunal because of the expiration of the limitation period. Further, I decline to exercise the Tribunal's discretion to extend the limitation period under s. 7 of the *LAT Act* to allow her to proceed.

[7] I find S.S. failed to attend properly scheduled s. 44 IEs to determine entitlement to two treatment plans and her standing within the MIG. Accordingly, since the MIG cannot be a stand-alone issue, she is statute-barred from proceeding with her application under s. 55 of the *Schedule*.

ANALYSIS

Limitation Period

[8] Section 56 of the *Schedule* states 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. It is undisputed that S.S.'s two-year limitation period to appeal RSA's denial of the two treatment plans elapsed on October 26, 2018. As noted, her application was filed on April 30, 2019, over six months after the limitation period expired.

[9] Despite this, S.S. argues that RSA's s. 44 assessment requests were unreasonable and unnecessary considering the objective medical evidence she provided to RSA that she submits should have removed her from the MIG. To this end, she submits that there is no need to dispute that she is barred from appealing the treatment plans because her medical history is significant for degenerative disc disease, fibromyalgia and deep vein thrombosis. S.S. also submits that she suffered a right shoulder tear from the accident.

[10] On the evidence, I find RSA's requests to be in line with the requirements of the *Schedule* and there does not seem to be any issue with the notices it provided. On receipt of the additional medical documentation that S.S. submitted following the denial, I find RSA considered it and maintained its position that the MIG applied and that the treatment plans were not reasonable and necessary. In submissions, S.S. simply argues that it is obvious that her impairments are not

within the MIG, which also seems to have formed the basis for her initial refusal to attend the IEs. Yet, S.S. did not direct the Tribunal to a concurrent opinion from a medical professional linking the impairments to the accident or opining that her pre-existing conditions would prevent her recovery under the MIG from her accident-related impairments, which is the test she must meet for removal from the MIG. The diagnosis of a shoulder tear was not made until 2019, after the limitation period expired, which I agree raises causation issues.

[11] In any event, the preliminary issue before the Tribunal is not whether the MIG applies, but whether S.S. is precluded from bringing her application because she failed to appeal the denials within the two-year limitation period. Since S.S. does not really argue that the denial notices or scheduling of the s. 44 IEs were improper and does not deny missing the limitation period by a considerable amount of time, I find her only possible relief here is through an extension of the limitation period under s. 7 of the *LAT Act*.

Section 7 of the LAT Act

[12] I decline to exercise the Tribunal's discretion to extend the limitation period under s. 7 of the *LAT Act* as I find the four factors weigh in favour of RSA.

[13] S.S. urges the Tribunal to extend the limitation period by using its discretion under s. 7 of the *LAT Act*. In short, s. 7 permits the Tribunal to extend the two-year limitation to appeal a denial if the Tribunal is satisfied that there are reasonable grounds to do so. The s. 7 analysis considers four factors that were adopted by the Executive Chair in her reconsideration decision *A.F. v. North Blenheim*: the existence of a *bona fide* intent to appeal within the limitation period, the length of the delay in doing so, the prejudice to the other party and the merits of the appeal.[1] The four factors are not strict elements that must all be met, but certain factors may attract more weight than others.

[14] While it provided a fulsome analysis on the four factors, RSA also submits that the Tribunal does not have the jurisdiction to extend the limitation period via s. 7 due to "negative treatment" following the Executive Chair's decision. The negative treatment stems from two Tribunal decisions by the same Member that determined that there is no authority for the Tribunal to rely on s. 7 because the two-year limitation period to appeal a denial is not prescribed under an act, as s. 7 dictates, but rather under a regulation, being the *Schedule*.[2]

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[1] *A.F. v. North Blenheim Mutual Insurance Company*, 2017 CanLII 87546.
[2] *See*, *S.S. v. Certas Home and Auto* (Tribunal File 18-001196/AABS, September 5, 2019); and *M.N. v. Aviva*, (Tribunal File 19-001096/AABS, November 1, 2019).

[15] In my view, the Tribunal continues to have the discretion to utilize s. 7 of the *LAT Act* to extend a limitation period in certain circumstances. While I note that neither of the decisions RSA cites nor the Executive Chair's reconsideration decision in *A.F. v. North Blenheim* are binding on me here, the two "negative" s. 7 decisions are currently under appeal. Until such time that the Divisional Court determines that the Tribunal does not have jurisdiction to use s. 7, I follow the Executive Chair's lead that the Tribunal does. While I understand RSA's (or all insurers') preference for a strict reading of s. 7, I remain of the view that since the two-year limitation period is contained within a regulation, being the *Schedule*, which in turn is enacted under the *Insurance Act,* that s. 7 of the *LAT Act* provides for the discretion to extend the limitation period because applications under s. 280(2) are "notices requiring a hearing." In any event, given my ultimate finding, RSA's position on s. 7 is moot.

[16] First, I find it difficult to reconcile, on one hand, S.S.'s position that she always had an intention to appeal RSA's denials but that her pre-existing impairments and medical appointments prevented her with, on the other hand, the fact that there was seemingly no correspondence between S.S. and RSA in the 30 or so months between the denials and her application at the Tribunal. Indeed, S.S. provided no evidence of an ongoing dispute over the s. 44 IEs, over RSA's MIG position or its denials of the two treatment plans. I agree with RSA that S.S.'s post-denial behaviour was evidence of the opposite of a *bona fide* intention to appeal. In my view, this factor favours RSA.

[17] Second, I disagree with S.S.'s sole submission that the length of the delay is "not significant considering the application has not progressed since the submission of the treatment plans." In its s. 7 jurisprudence, the Tribunal has found that delays constituting a few business days or perhaps weeks where there are extenuating circumstances are permissible delays to utilize s. 7. However, S.S. did not direct the Tribunal to precedent where s. 7 was used to extend a limitation period where the delay was over six months *following* a two-year period of silence from the applicant. Even if I accept that pre-existing conditions and medical appointments could prevent an application to the Tribunal generally, S.S. furnished no specific evidence that her pre-existing conditions prevented her from appealing the denials every single day for over six months. Indeed, the parties are still disputing the MIG at this preliminary stage, so this is not a case where catastrophic injuries continuously prevented S.S. or her counsel from filing an application for two years plus six months. Here, again, I find this factor weighs heavily in favour of RSA.

[18] Third, I disagree with S.S. that there is no prejudice whatsoever to RSA in extending the limitation period because it has not incurred any costs as a result of procuring assessments, experts and medical opinions. Typically, the prejudice factor does tend to skew in favour of the applicant when it comes to extending limitation periods, because applicants may be prevented from accessing benefits they need, and insurers only have financial reserve or evidentiary considerations in comparison. However, in this specific case, I find this is the rare s. 7 issue where there is material prejudice to the insurer as a result of the applicant's delay. If the matter were to proceed, I agree with RSA that it would be at a significant evidentiary disadvantage because it has been nearly four years since the accident and both it and its assessors would then be in a position where they have to opine retroactively on dated medical evidence to determine causation, S.S.'s accident-related impairments and benefit status at various periods in time. While I do not accept that the total amount in dispute for two treatment plans would significantly upset RSA's reserves, as alleged, I do find that, given the delay and the missed opportunity to rebut S.S.'s medical evidence, that potential prejudice is not confined only to S.S.

[19] Finally, S.S. submits that there are "undeniable" merits to her claim, citing her right shoulder injury and pre-existing conditions as evidence that her appeal should be allowed to proceed. I disagree that S.S.'s impairments are evidence enough to overcome the significant delay and lack of intention to appeal. As stated above, I find S.S. provided limited medical evidence and no concurrent medical opinions following the accident linking her impairments to the accident or demonstrating that her pre-existing conditions prevent maximal medical recovery under the MIG. The Dr. Lombardi report, on which S.S. relies for her shoulder injury, was completed outside of the limitation period in February 2019 and seems to comment retroactively on S.S.'s clinical notes. While I accept that there may be some merit to S.S.'s shoulder injury based on this report, causation remains an issue and I query why S.S. still waited another two months to file her appeal at the Tribunal when she had this report in hand.

[20] For these reasons, I find the analysis favours RSA and I decline to exercise the Tribunal's discretion under s. 7 of the *LAT Act* to extend the limitation period.

Section 55(1)2

[21] Section 44 of the *Schedule* states that an insurer may request an examination to determine if an insured person is or continues to be entitled to a benefit. Section 44(5) states that notice must be provided, along with medical or other reasons for the IE, as well as the particulars of the assessment, like date, time and specialty.

Failure to attend a properly scheduled IE triggers s. 55, meaning an insured is statute-barred from applying to the Tribunal until such time that they attend.

[22] As noted, S.S. argues that RSA's s. 44 assessment requests were unreasonable and unnecessary considering the objective medical evidence she provided to RSA that she submits should have removed her from the MIG. She submits that there is "no need to dispute that she is barred from appealing the treatment plans because her medical history is significant" for degenerative disc disease, fibromyalgia and deep vein thrombosis. In response, RSA submits that it complied with its statutory obligations as its notice was sufficient and provided the reason for the IEs – namely, that S.S.'s injuries appeared to fall within the MIG and an assessment to determine whether the treatment plans submitted were reasonable and necessary was required. Accordingly, since S.S. failed to attend the IE to determine entitlement to the two treatment plans in dispute, she is statute-barred from applying until she attends.

[23] I agree with RSA. On review of the explanation of benefit letters and the IE notices, I find RSA met all of its obligations under the *Schedule*. The reason for the denial and need for the IEs is clearly articulated (RSA believed the MIG applied, there was no compelling medical documentation, the treatment plans are not reasonable and necessary); the notices of examination clearly identify the benefits to be assessed (including who will be assessing S.S., whether her attendance is required, the date, time and location, transportation, etc.); and the initial and final notices dated September 26 and November 23, 2016, respectively, also provides the two-year limitation warning and outlines her options to dispute.

[24] I find RSA was well within its rights under the *Schedule* to request an assessment on S.S.'s entitlement to the benefits in dispute and whether the MIG applied and S.S. refused to attend. Accordingly, I agree with RSA that s. 55(1)2 statute-bars S.S. from proceeding with her claims for the two treatment plans in dispute. While S.S.'s status within the MIG may change, given that the two-year limitation to appeal the denials of the two treatment plans has elapsed, I find she is out of avenues to dispute her entitlement to the two treatment plans and given the reasons above, I decline to use the Tribunal's discretion under s. 55(2) to permit her to apply.

MIG as a status

[25] While S.S. touched on this briefly in her initial submissions, her reply submissions delve more deeply into her argument that because the MIG is not a benefit, but rather a threshold or status, that it should not be subject to the

limitation period. As I understand it, S.S. submits that if RSA removed her from the MIG, there would no longer be a preliminary issue dispute. She submits that she should be permitted to proceed with her appeal of the MIG determination, the two treatment plans, her award claim, and interest.

[26] On review, RSA does seem to indicate in its submissions that the MIG denial has a separate date of denial from the denial of the treatment plans. I agree with S.S. that there is no limitation period on a "status" like the MIG, which is not a benefit under s. 56 like the two treatment plans, and that RSA's position could possibly change if S.S.'s accident-related condition declines. Whether the MIG continues to apply to S.S. moving forward is a dispute between the parties that is irrelevant to this preliminary matter. Further, S.S. withdrew her claims for non-earner benefits and attendant care benefits that were identified in the initial application.

[27] Additionally, having determined that S.S. is out of time to appeal the denial of the two treatment plans and also that she failed to attend properly scheduled IEs to determine entitlement to same, procedurally, all that remains in the application is the MIG determination, the award claim and interest, none of which are "benefits" under s. 56. As it is well-settled that a MIG determination cannot be a stand-alone issue and must be accompanied by a benefit, it follows that S.S. cannot proceed with her application at the Tribunal as it currently stands. Accordingly, I find S.S. is statute-barred from proceeding under s. 55.

CONCLUSION

[28] S.S. failed to appeal RSA's denial of two treatment plans within the two-year limitation period and the Tribunal declines to exercise its discretion to extend the limitation period under s. 7 of the *LAT Act*. S.S. is precluded from pursuing these benefits because of the expiration of the limitation period.

[29] S.S. failed to attend a properly scheduled s. 44 IE and is therefore statute-barred from proceeding with her appeal of the denials of the two treatment plans under s. 55 of the *Schedule*. As no benefits remain in the application, it follows that she cannot proceed with her application.

Released: June 23, 2020

Jesse A. Boyce
Adjudicator