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.W. vs. Aviva General Insurance, 2020 ONLAT 19-002127/AABS

Tribunal File Number: 19-002127/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.W.

Applicant

and

Aviva General Insurance

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Alan W. Gordon, Counsel

For the Respondent: Ramandeep Pandher, Counsel

Written Hearing on: **October 28, 2019**

OVERVIEW

[1] S.W. was injured in a motor vehicle accident on **December 23, 2015** and sought benefits from the respondent, Aviva General Insurance, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] Aviva denied S.W.'s claim for income replacement benefits ("IRBs") on February 13, 2017. S.W. argues that the limitation period did not begin to run until February 25, 2017 due to the termination date and delivery by mail. S.W. applied to the Tribunal for dispute resolution and the application was received by the Tribunal on February 25, 2019, which Aviva argues is past the two-year limitation period to dispute a denial under the *Insurance Act*. Accordingly, Aviva raised the preliminary issue that S.W. is statute-barred from proceeding with her application due to her failure to file her application within the two-year limitation period.

PRELIMINARY ISSUE

[3] The following preliminary issue was raised by Aviva:

i. Is the applicant barred from proceeding with her application because she failed to dispute the respondent's denial of her ongoing entitlement to income replacement benefits within the two-year time limit required under the *Schedule*?

RESULT

[4] I find that S.W. may proceed with her claim before the Tribunal.

ANALYSIS

Aviva's denial and Smith v. Co-operators

[5] Section 56 of the *Schedule* provides that an application under subsection 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.

[6] It is important to determine whether Aviva's notice of denial was proper in accordance with the principles outlined in *Smith v. Co-Operators General Insurance Company.*[2] Generally, notices of refusal to pay benefits must contain

[1] O. Reg. 34/10.
[2] 2002 SCC 30, at para 14.

straightforward and clear language, must be directed towards an unsophisticated person, must outline the dispute resolution process and the relevant time limits that govern the process and must provide valid medical or other reasons for the denial. If an insurer's notice to an insured does not meet these basic requirements within certain timelines prescribed by the *Schedule*, the denial may be invalid, and the two-year limitation period under the *Insurance Act* may not be triggered.

[7] On review of the notice letter dated February 13, 2017, I find that Aviva's denial was proper and in accordance with the *Schedule*'s requirements and the principles of *Smith*. Importantly, I find that the notice of refusal to pay IRB contained straightforward and clear language (including notice that S.W.'s IRB would be terminated on February 20, 2017), was directed towards an unsophisticated person (the language is simple and clear and I note S.W. was represented by counsel), outlined the dispute resolution process (the standard form outlining the options was attached), stated the relevant time limits that govern the process (the two-year warning notice is bolded and prominent) and provided valid reasons for the denial (that two s. 44 Insurer's Examinations determined S.W. was not entitled to an IRB). On its face, I find no evidence to suggest the denial was improper. In addition, the notice letter is clearly dated February 13, 2017—thus triggering the limitation period—even if it identifies a future date, being February 20, 2017, as the date of IRB termination. Accordingly, I reject S.W.'s assertion that the two-year limitation period elapsed on February 20, 2019.

Effective date of Notice of Denial and the Tribunal's Common Rules

[8] Indeed, S.W.'s argument is rooted in several technicalities under Rule 6 of the Tribunal's *Common Rules of Practice and Procedure*. She argues that notice to an insurer of an intent to pursue a claim constitutes the actual filing date and since her notice was delivered to Aviva on February 15, 2019, her application was not overdue. Aviva argues that this is absurd. I agree with Aviva. This would result in notice potentially being sent to an insurer within the two-year limitation period—effectively allowing an applicant to sit on her rights indefinitely—and then submit her actual application to the Tribunal for dispute resolution at a later time when it is convenient for the applicant, or possibly never at all. While I would agree that this constitutes notice to Aviva of a *bona fide* intention to appeal, it does not constitute an application under the *Insurance Act* and would certainly not have been registered as an open file with the Tribunal. In any event, I find the notice of intent to appeal sent to Aviva by S.W. is not functionally equivalent to actually submitting an appeal to the Tribunal.

[9] S.W. also argues that Aviva's actual date of denial was five business days later than it alleges, relying on s. 64(18) of the *Schedule*. Essentially, S.W. argues that because Aviva sent her personal notice of its denial via regular mail (Aviva also sent it by fax and mail to her counsel) that service actually occurred five days later in order to account for delays in the postal system, which would make the limitation period deadline February 25, 2019. Again, I disagree. While this may apply in certain circumstances and especially in a bygone era where postal service was the only form of service, it is well-settled that service occurs at the earliest date of delivery, whether it is to the applicant or to applicant's counsel, as permitted by s. 64(2). Here, I find that Aviva sent the notice of denial by fax to S.W.'s counsel on February 13, 2017 as well as by regular mail to S.W. and her counsel. The date of the notice letter for both is February 13, 2017, which is the date the limitation period began.

Courier Issues and LAT address

[10] S.W. argues that delivery of her notice of appeal was attempted on February 15, 2019 but was not accepted by the Tribunal. S.W. submitted a FedEx slip as evidence that her application was sent via overnight priority courier on February 14, 2019 and was not signed for on delivery by the Tribunal until the afternoon of February 22, 2019 and not processed as an application by the Tribunal until February 25, 2019. S.W. argues that the receipt of the application by the Tribunal was beyond "her knowledge and control" but that the attempted delivery on February 15, 2019 is proof that the "Tribunal knew [S.W.] intended to file an application." S.W. submits that FedEx went to the wrong address and provided an affidavit and a Google search as evidence that the Tribunal was operating from multiple addresses during this period. In sum, S.W. submits that under Rule 6.4, the Tribunal "should be satisfied that the contents of her application came to the attention of the person to whom it was intended" and should be deemed received. In response, Aviva submits that S.W. was represented by counsel and a sophisticated party conducting business regularly at the Tribunal should have been capable of determining the correct address for delivery, since the Tribunal provides regular updates in its correspondence. Further, Aviva submits S.W. offered no evidence of the Tribunal's refusal to accept her application.

[11] I agree with Aviva. S.W.'s counsel had two years to figure out the Tribunal's correct address for applications and it was this delay that ultimately added further complication to a rushed application process. A requisite amount of due diligence is expected where a party is represented by counsel and the inclusion of a Google search as evidence that the Tribunal is somehow at fault for a failed

delivery is, in my view, unacceptable. While there is an air of reality to S.W.'s claim since it took FedEx five business days—accounting for the Family Day holiday when the Tribunal was closed—to complete "priority overnight" delivery and the Tribunal was, during this period in time, conducting its operations temporarily from four separate addresses, I still find, in every scenario, that delivery was late. S.W. only asserts that the delivery was "rejected" or "redirected"—brazenly laying this error at the Tribunal's feet—without providing actual evidence that delivery was even attempted prior to February 22, 2019.

[12] Accordingly, I find Aviva provided S.W. with a valid denial of IRBs on February 13, 2017. The denial was clear and unequivocal and provided S.W. with the requisite information to determine whether to dispute the denial while also triggering the limitation period. S.W. then failed to commence her application at the Tribunal in time. I find there is no "relief" for S.W. under Rule 6. Further, in the absence of evidence to substantiate her claims, I do not accept her arguments regarding the courier issues that allegedly plagued service. Finally, as she was continuously represented by counsel, I find the lack of due diligence in securing the proper address for the Tribunal to be unpersuasive. I find she is statute-barred from proceeding with her claim.

Section 7 of the LAT Act

[13] However, s. 7 of the *LAT 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.[3] These four 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. Whether to grant an extension of time depends on the specific circumstances of each case.[4]

[14] Having determined that Aviva's denial was clear and unequivocal, justice still requires that the Tribunal consider whether an extension of the limitation period should be granted. Citing a recent decision, *18-00196 v. Certas Home and Auto*, Aviva argues that the Tribunal does not have jurisdiction to extend the

[3] *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002*, 2012 ONSC 1492 (CanLII).
[4] *A.F. v. North Blenheim Mutual Insurance Company and N.L. v. North Blenheim Mutual Insurance Company*, 2017 CanLII 87546 (ON LAT), at paras. 28-30.

limitation period under s. 7 of the *LAT Act*. I am very aware of the decision on which Aviva relies. Respectfully, I disagree with its analysis and ultimate conclusion and note that it is currently under appeal. In any event, I note that that decision is not binding on me here. Absent direction from a court of superior jurisdiction on the applicability of s. 7, I follow the significant body of existing jurisprudence from this Tribunal indicating that this Tribunal does have jurisdiction under s. 7 of the *LAT Act* to extend a limitation period if the justice of the case supports it. Here, I find evidence to justify exercising the Tribunal's discretion to extend the limitation period under s. 7 of the *LAT Act*.

[15] First, I find it clear that S.W. had a *bona fide* intention to appeal Aviva's denial as evidenced by her notice to Aviva of her intent to pursue a claim on February 15, 2019 and her subsequent attempts to file her notice of appeal between February 15, 2019 and February 25, 2019.

[16] Second, the length of the delay is, in my view, insignificant. The parties are not arguing over years, months or even weeks. The parties are arguing over a matter of days, and specifically, business days.

[17] Third, and quite obviously, barring an application will almost always result in more prejudice to an applicant than it will to an insurer. While I appreciate Aviva's desire to have hard limitations, I do not find that S.W.'s application came as a surprise and applications, in my view, should be determined on the merits when the delay is not long or prejudicial. This is not a situation where months or years elapsed without the ability to conduct examinations or for a causation issue to come into play. I fail to see the prejudice to Aviva where S.W. had given it notice of her intent to pursue a claim, the application was submitted mere days following the limitation period and Aviva made no submissions to demonstrate the prejudice it would suffer.

[18] Finally, I find on the limited evidence before the Tribunal that there is likely merit to S.W.'s claim. Although a complete analysis of entitlement is beyond the scope of this hearing, I find the psychological report and disability benefit payment records in evidence provide enough support to satisfy the Tribunal that S.W. may be entitled to an IRB for the period in dispute.

[19] In conclusion, the Tribunal exercises its discretion under s. 7 of the *LAT Act* to extend the limitation period to permit S.W. to proceed with her application.

S.W.'s Motion

[20] Prior to the commencement of this written hearing, S.W. filed a motion with the Tribunal requesting that Aviva's reply submissions be struck as they are improper and beyond the length provided by the Case Conference Order. While lengthy, I did not find Aviva's response to be improper. Given my ultimate finding here, the extra pages utilized by Aviva in its reply are inconsequential.

CONCLUSION

[21] S.W. may proceed with her application before the Tribunal. The parties are directed to contact the Tribunal to schedule a case conference in order to determine how to proceed with the substantive issues.

Released: January 22, 2020

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Jesse A. Boyce
Adjudicator