

**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: **Ummugulsum Yatar vs. TD Insurance, 2019 ONLAT 18-002397/AABS**

Date: April 29, 2019

File Number: 18-002397/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*,
RSO 1990, c l.8., in relation to statutory accident benefits.

Between:

Ummugulsum Yatar

Appellant(s)

and

TD Insurance Meloche Monnex

Respondent

PRELIMINARY HEARING DECISION

ADJUDICATOR:

Ian Maedel

APPEARANCES:

Ummugulsum Yatar., Applicant

Jillian Van Allen, Counsel for the Applicant

Derek Greenside, Counsel for the Respondent

Heard in-person on:

January 21, 2019

OVERVIEW:

- [1] The applicant was injured in an automobile accident on February 7, 2010, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996 ("Schedule")*.
- [2] The applicant filed an application before the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") on March 16, 2018.
- [3] A case conference was held on October 9, 2018 before Vice Chair White. The matter was set for a preliminary issue combination hearing (written submissions and in-person cross examination). The in-person portion of the hearing was scheduled for January 21, 2019 in Toronto, Ontario.
- [4] Pending the determination of the preliminary limitation period issue, the substantive issues in dispute that may proceed to a full hearing are entitlement to income replacement benefits, housekeeping benefit and home maintenance benefits, interest and an award pursuant to s.10 of Regulation 664 of the *Insurance Act*.

ISSUE TO BE DECIDED:

- [5] The following is the preliminary issue to be decided:
 - i. Is the applicant precluded from proceeding with her application for ongoing IRB and housekeeping and home maintenance benefits because she missed the statutory two-year limit to dispute the respondent's denial?

RESULT:

- i. The Application for income replacement benefits is statute-barred by operation of the two-year limitation period. The limitation period for this benefit lapsed in April 2014. The application for IRB is dismissed.
- ii. The application for housekeeping and home maintenance benefits is statute-barred by operation of the two-year limitation period. The limitation period for this benefit lapsed in April 2014. The application for this benefit is dismissed.
- iii. Any claim of interest for housekeeping and home maintenance benefits or income replacement benefits is dismissed.
- iv. A case conference shall be reconvened within thirty days to address the outstanding issue of an award pursuant to s. 10 of Regulation 664 of *the Insurance Act* which remains an issue in dispute.

ANALYSIS:

- [6] The applicant's claim for income replacement benefits and a housekeeping and home maintenance benefit is dismissed. These benefits are both statute-barred pursuant to the two year time limit as laid out in the applicable sections of the *Insurance Act* and *Schedule* at time of the accident.

The Law

- [7] Section 281.1(1) of the *Insurance Act* states that a proceeding shall be commenced within two years after the insurer's refusal to pay the benefit claimed.¹ Similarly, section 51 of the applicable *Schedule* states that a court proceeding or arbitration pursuant to s. 281(a) or (b) shall be commenced within two years of the insurer's refusal to pay the amount claimed.²
- [8] The relevant principles regarding limitation periods and an insurer's refusal to pay benefits can be summarized in the reconsideration decision of the Tribunal in *G.P. and Aviva Insurance Company of Canada*.³ The following principles, and the cases from which they arise, are persuasive and worth highlighting:
- i. 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 Automobile Insurance Company*; *Zeppieri v. Royal Insurance Co. of Canada* ("Zeppieri"); *Monks and Dominion of Canada General Insurance Company*;⁴
 - ii. The notice to an applicant of an insurer's refusal to pay benefits must also contain, in straightforward and clear language, directed to 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)*; *Sietzma v. Economical Mutual Insurance Company* ("Sietzma");⁵
- [9] While the Schedule must be interpreted from a consumer protection perspective as per *Smith and Cooperators*, limitation periods operate to provide procedural fairness to the parties. Limitation periods provide certainty, preserve evidence,

¹R.S.O. 1990, CHAPTER I.8

²O. Reg. 403/96: Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996, at s. 51.

³*G.P. and Aviva Insurance of Canada*, 2017 16-000726, CanLII 77379 (ON LAT).

⁴*Turner v. State Farm Mutual Automobile Insurance Company*, 195 OAC 61, 2005 CanLII 2551 (C.A.); *Zeppieri v. Royal Insurance Co. of Canada* [1994] O.I.C.D. No. 13 (QL), *Monks and Dominion of Canada General Insurance Company* [2009] OFSCD No. 162 (QL).

⁵*Smith v. Co-operators General Insurance Co.* [2002] 2 SCR 129, 2002 SCC at para. 14, *Sietzma v. Economical Mutual Insurance Company*, 2014 ONCA 111 (CanLII).

and ensure that parties are diligent and do not 'sleep on their rights' and will pursue claims in a timely fashion.⁶

The Denial

- [10] On January 7, 2011 the respondent provided correspondence to the applicant denying her income replacement benefits ("IRB") and housekeeping benefits. A notice of examination was attached requiring her attendance for Insurer's Examinations before a psychologist, and a physiatrist. Below the signature line, it states "Encl. Applicant's Right to Dispute".⁷
- [11] On February 16, 2011, the respondent provided correspondence to the applicant denying her housekeeping and home maintenance benefit and income replacement benefit following the insurer's examinations completed. Enclosed with the correspondence were the insurer's examination ("IE") reports.⁸ There was no Applicant Right to Dispute sheet attached to this correspondence.
- [12] The applicant submits there was no valid refusal of the IRB and housekeeping and home maintenance benefit, as the applicant was not properly informed of her right to dispute as per *Smith v. Cooperators General Insurance Company* and the applicable *Schedule*.⁹
- [13] The respondent submits the applicant was served with proper notice of the dispute procedure with the denial letters and if she wasn't, she had imputed knowledge of the dispute procedure and the two-year limitation period as per the many other notices received in regard to the denial of other benefits.
- [14] There is some dispute as to whether the Dispute Resolution Form was attached to the January 7, 2011 denial correspondence. The applicant submits the facsimile cover page and transmission report sent to applicant counsel indicate that six pages were sent, including a cover page, two pages of correspondence and a three-page Notice of Examination (OCF-25).¹⁰ If the Dispute Resolution sheet was attached, the facsimile transmission would have reflected additional pages. The respondent's witness, Adjuster David Lawrence indicated the sheet was attached to the correspondence sent to the applicant and has included a copy of the Dispute Resolution sheet as part of the denial correspondence at Exhibit "B" of his Affidavit.¹¹

⁶ *Czajkowski v. Wawanesa Mutual Insurance Co.*, 2015 CarswellOnt 13357 (FSCO) at para. 24. Factum of the Respondent at Tab D.

⁷ Affidavit of Samiya Ahmad sworn November 9, 2018 at Exhibit 2. Affidavit of David Lawrence sworn December 4, 2018 at Exhibit B.

⁸ Affidavit of Samiya Ahmad sworn November 9, 2018 at Exhibit 3. Affidavit of David Lawrence sworn December 4, 2018 at Exhibit C.

⁹ [2002] 2 S.C.R. 129. *Insurance Act*, O.Reg. 403/96 Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996.

¹⁰ Applicant's Factum paras. 6 and 7. Affidavit of Samiya Ahmad sworn November 9, 2018 at Exhibit 3.

¹¹ Affidavit of David Lawrence sworn December 4, 2018 at Exhibit B.

- [15] The respondent has the onus, on a balance of probabilities, to establish that it properly denied the benefit. I find the Dispute Resolution Form was attached to the January 7, 2011 correspondence. The Form is clearly attached to the denial letter in the Adjuster's Affidavit. This is the correspondence sent to the applicant by mail. This is not the correspondence sent to the applicant's counsel via facsimile, to which the Form may or may not have been attached, according to the facsimile confirmation provided by the applicant. Similarly, I am unconvinced by the applicant's submissions regarding perforations on the copies of the correspondence and not on the Form.
- [16] The applicant provided evidence that she moved from her previous address, but was unsure of the date. Neither party has provided confirmation of service via mail nor do I have reason to doubt that this correspondence was otherwise not served on the applicant via mail in January 2011 as marked.
- [17] Given that I have found the Dispute Resolution Form was attached, this correspondence does constitute a valid denial pursuant to *Zeppieri* and the dispute resolution process is clearly set out in the Form as per *Smith and Co-operators*.
- [18] However, even if this denial did not provide reasons that were legally correct, the applicant was required to dispute this denial of these benefits within two years as per *Sietzma*.¹²

The Limitation Period

- [19] The applicant filed this Application before the Tribunal on March 16, 2018, more than seven years after these benefits were denied on January 7, 2011.
- [20] As per Section 281.1(1) of the *Insurance Act* and s. 51 of the *Schedule*, the limitation period is two years. However, this limitation period is extended by a period of thirty days pending an evaluation under section 280.1, or an extension of ninety days after the mediator reports to the parties pursuant to s. 280(8).
- [21] The applicant applied for mediation at the Financial Services Commission of Ontario ("FSCO") on September 13, 2012 to dispute the denial of the income replacement benefit, and housekeeping and home maintenance benefits. The mediation took place between June 18, 2013 and January 14, 2014. The mediator's report is dated January 14, 2014.¹³ Thus, with a ninety-day extension of the limitation period following the report of the mediator, the limitation period lapsed April 14, 2014.
- [22] Nothing was done to protect the applicant's rights pursuant to the limitation period in the intervening twenty-three months between April 14, 2014 and the

¹² *Sietzma v. Economical Mutual Insurance Company*, 2014 ONCA 111 (CanLII).

¹³ Affidavit of David Lawrence sworn December 4, 2018 at Exhibits F and G.

filing of the Notice of Action filed in the Ontario Superior Court of Justice on March 31, 2016.

- [23] A Statement of Claim was issued by the Ontario Superior Court of Justice on April 29, 2016.¹⁴ In an Order dated March 27, 2017, with the consent of the parties, the Court dismissed the action without costs.¹⁵ By this time, the two-year statutory limitation period laid out in the *Schedule* had clearly lapsed.
- [24] Nothing was done to protect the applicant's rights pursuant to the limitation period in the additional twelve months between March 27, 2017 and the filing of this Application before the Tribunal on March 16, 2018.
- [25] At this hearing, counsel from her previous law firm was present and cross-examined pursuant to her affidavit. From counsel's evidence, it is clear that lawyers at her firm should have been aware of the applicable two-year limitation period. It is also clear that the applicant relied on the expertise of her counsel, to her detriment, in the face of the statutory limitation period.
- [26] The limitation period lapsed April 14, 2014, following the statutory ninety-day extension following the report of the mediator. The claim for these benefits had been statute-barred for almost four years when this Application was filed with the Tribunal on March 28, 2018. This is not a case where the applicant has inadvertently missed the expiry of the limitation period by a few weeks or even months. There must be some certainty in the process to ensure that applicants cannot return and claim a benefit that had statutorily lapsed years earlier.
- [27] Thus, I find the statutory limitation period for the IRB and housekeeping and home maintenance benefit must be upheld in this case. The applicant is statute-barred from pursuing this claim for IRB and housekeeping and home maintenance benefits, accordingly the application for these benefits is dismissed. Given this dismissal, any claim for interest flowing from these benefits is also dismissed.

ORDER

- [28] The Tribunal orders that:
- i. The Application for income replacement benefits is statute-barred by operation of the two-year limitation period. The limitation period for this benefit lapsed in April 2014. The application for IRB is dismissed.
 - ii. The application for housekeeping and home maintenance benefits is statute-barred by operation of the two-year limitation period. The limitation

¹⁴ Affidavit of David Lawrence sworn December 4, 2018 at Exhibits I and J.

¹⁵ *Ibid* at Exhibit K.

period for this benefit lapsed in April 2014. The application for this benefit is dismissed.

- iii. Any claim of interest for housekeeping and home maintenance benefits or income replacement benefits is dismissed.
- iv. A case conference shall be reconvened within thirty days to address the outstanding issue of an award pursuant to s. 10 of Regulation 664 of the *Insurance Act* which remains an issue in dispute.

Released: April 29, 2019



**Ian Maedel
Adjudicator**