CITATION: Yatar v. TD Insurance Meloche Monnex, 2021 ONSC 2507
DIVISIONAL COURT FILE NO.: 221/20 & 241/20
DATE: 20210421

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Penny and Kristjanson JJ.

B E T W E E N:	
UMMUGULSUM YATAR	*Jillian Van Allen* for the Appellant/Applicant
Appellant/Applicant	
- and -	
TD INSURANCE MELOCHE MONNEX	*Derek Greenside* for the Respondent
Respondent	
- and -	
LICENCE APPEAL TRIBUNAL	*Valerie Crystal* for the Intervenor
Intervenor	**HEARD at Toronto by videoconference:** January 5, 2021

REASONS FOR DECISION

Kristjanson J.

Overview

[1] Ms. Yatar seeks to concurrently appeal and judicially review the April 29, 2019 decision of Licence Appeal Tribunal ("LAT") adjudicator Ian Maedel. The issue before the LAT was whether a 2011 letter from TD Insurance Meloche Monnex constituted a valid denial of statutory accident benefits triggering the two-year limitation period for commencing an application to dispute the insurer's denial. The LAT held that the 2011 letter did so, and Ms. Yatar's claims were statute-barred. The LAT affirmed the decision following reconsideration in a decision dated April 23, 2020.

[2] Since a statutory appeal under the *Licence Appeal Tribunal Act, 1999*, c. 12, Sched. G ("LAT Act"), section 11(6) is limited to questions of law, Ms. Yatar seeks judicial review of the decision if this court determines the errors of the LAT are errors of fact or mixed fact and law.

[3] The appeal is dismissed since the LAT's decisions do not raise questions of law, but only questions of fact and mixed fact and law.

[4] Judicial review is a discretionary remedy. Only in exceptional circumstances will this court exercise its discretion to consider a judicial review application where there has been a statutory appeal from a LAT decision about statutory accident benefits. There are no exceptional circumstances here, and this court declines to judicially review the decision.

Factual Background

[5] Ms. Yatar was injured in an automobile accident in February 2010 and sought benefits under the *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996*, O. Reg. 403/96 ("SABS"). TD was her insurer.

[6] On January 7, 2011, TD sent Ms. Yatar a letter denying her application for housekeeping, home maintenance, and income replacement benefits. The letter indicated that the denial was a result of Ms. Yatar's failure to submit a completed disability certificate (OCF-3). Payments of the benefits were stopped as of January 4, 2011. She was directed to provide a completed disability certificate and was provided with a notice to attend an examination by TD's chosen assessor. She attended two such examinations on January 17 and January 27.

[7] On February 16, 2011, TD sent another letter, again denying the claim for housekeeping and home maintenance benefits. The letter stated that following the medical assessment, Ms. Yatar did not have a sufficient ongoing impairment to qualify for the benefit. It also stated that she was eligible for income replacement benefits. The housekeeping benefit was stopped as of February 16, 2011.

[8] On September 19, 2011, TD sent another letter, advising Ms. Yatar that she was not eligible for income replacement benefits because of the results of an insurer's examination report completed by a psychologist. The income replacement benefit was stopped as of September 28, 2011.

Statutory Scheme

[9] Both the SABS and the *Insurance Act*, R.S.O. 1990, c. I.8, have been extensively amended since Ms. Yatar's 2010 accident. Before April 2016, disputes about an insured person's entitlement to or amount of accident benefits were resolved in accordance with sections 280 to 283 of the *Insurance Act* and the SABS, which provided that SABS disputes could be resolved by arbitration or court proceedings. At the time, the Financial Services Commission of Ontario ("FSCO") was the administrative body involved in SABS dispute resolution. Mediation of SABS claims through FSCO was the mandatory first step in dispute resolution. Following a mediation, the mediator was required to report to the parties: *Insurance Act*, section 280(8), as it read on March 31, 2016 (the "former *Insurance Act*"). After a failed mediation, parties could begin an action in the courts to

determine SABS claims, or could proceed to arbitration, either through FSCO or in a private arbitration.

[10] The limitation period for beginning a proceeding was two years from the date of the insurer's refusal to pay the benefit claimed: section 281.1(1) of the former *Insurance Act* and SABS, section 51(1), as it appeared on March 31, 2016 (the "former SABS"). But if the parties pursued mediation, both the *Insurance Act* and the SABS extended the limitation period to ninety days after the mediator's report to the parties: section 280(8) of the former *Insurance Act* and section 51(2) of the former SABS.

[11] Section 49 of the former SABS provided a "right to dispute" as follows:

> If an insurer refuses to pay a benefit under this Regulation or reduces the amount of a benefit that a person is receiving under this Regulation, the insurer shall provide the person with a written notice concerning the person's right to dispute.

[12] The SABS dispute resolution system was significantly redesigned effective April 1, 2016. This included the elimination of FSCO mandatory mediations, the elimination of court actions, and the elimination of FSCO's role in arbitrations. The *Insurance Act* was amended, effective April 1, 2016, to provide the LAT with exclusive jurisdiction at first instance over the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled: *Insurance Act*, section 280.

[13] The Legislature also amended the LAT Act, effective April 1, 2016, by adding section 11(6) which provides that an appeal from a decision of the LAT "relating to a matter under the *Insurance Act* may be made on a question of law only."

[14] The LAT's *Rules of Practice and Procedure* providing for limited internal reconsideration of LAT decisions were adopted on April 1, 2016. The LAT rules have since been consolidated and replaced by the Common Rules of the License Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission, effective October 2, 2017. The Common Rules were amended effective February 7, 2019, to provide for a more flexible reconsideration process (including the power for adjudicators to hear reconsiderations from their own decisions, as happened in this case).

Proceeding Below

[15] Ms. Yatar applied for mediation at FSCO in September 2012. The mediation failed. The mediator's report to the parties, following mediation under section 280(8) of the former *Insurance Act*, was dated January 14, 2014.

[16] In March 2016, Ms. Yatar applied for arbitration at FSCO and started an action in the Superior Court of Justice. The Superior Court action was dismissed on consent in March 2017. It was not until March 2018 that Ms. Yatar filed an application before the LAT.

[17] The LAT held a preliminary issue hearing to determine whether the applicant was precluded from proceeding with her application for ongoing income replacement benefits and

housekeeping and home maintenance benefits because she missed the statutory two-year limit to dispute TD's denial. The adjudicator conducted a combination hearing with written submissions and in-person cross-examination. The LAT held that the application for all benefits was statute-barred as the two-year limitation period expired in April 2014, 90 days after the mediator's report.

[18] The adjudicator found that on January 7, 2011, TD sent Ms. Yatar a letter denying her application for housekeeping, home maintenance, and income replacement benefits. Ms. Yatar argued that her claims asserted in 2018 were not statute-barred since the insurer's denial was not clear and unequivocal. Ms. Yatar relied on the Supreme Court of Canada's decision in *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129. In *Smith*, the Supreme Court held that the limitation period in the SABS only begins to run once the insured has received a "clear and unequivocal denial" from the insurer. To be "clear and unequivocal", the denial must communicate the most important points of the dispute resolution process and the relevant time limits, in clear language from the perspective of the "unsophisticated person." In their submissions to the LAT, the parties disagreed about whether any of TD's letters to Ms. Yatar contained the standard-form "Applicant's Right to Dispute" document, which sets out the dispute resolution process and relevant time limits.

[19] The adjudicator found on a balance of probabilities, after hearing the oral evidence of three witnesses, that the January 7 letter sent to Ms. Yatar did contain a "Dispute Resolution Form", which was TD's standard-form document setting out the dispute resolution process and relevant time limits.

[20] Citing *G.P. and Aviva Insurance Company of Canada*, 2017 CanLII 77379 (ON LAT), the adjudicator determined that there were two key legal principles regarding limitation periods and an insurer's refusal to pay benefits. First, the notice to terminate or refuse accident benefits must be clear and unequivocal, to permit the applicant to decide whether to challenge the denial. Second, the notice of a refusal to pay benefits must 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 periods.

[21] Applying these legal principles, the adjudicator found that the January 2011 letter contained a copy of the Dispute Resolution Form. He found that the letter contained a clear and unequivocal denial of benefits. And, by virtue of the enclosure of the Dispute Resolution Form, he found that the most important points of the dispute resolution process and the relevant time periods were explained in clear language. As a result, the adjudicator dismissed the application.

Reconsideration Decision

[22] Ms. Yatar requested reconsideration from the LAT. The same LAT adjudicator heard the request for reconsideration. At the reconsideration hearing, the parties focused on the February 16 and September 19, 2011 letters. The adjudicator found that neither was a valid denial, as neither included the "Right to Dispute" form. He held, however, that this did not change the outcome because the January 7 letter was a valid denial of all benefits. The LAT dismissed Ms. Yatar's request for reconsideration on April 23, 2020.

Issues:

[23] The appeal and application for judicial review raise these issues:

(1) On the statutory appeal, did the LAT err in law in finding that the appellant's claims are barred because of a limitation period?

(2) If there is no error in law, and the appeal is dismissed, should this court exercise its discretion to hear the judicial review application?

Jurisdiction

[24] The Divisional Court has jurisdiction to hear the statutory appeal on a question of law only under section 11(6) of the LAT Act. Section 280(3) of the *Insurance Act* and section 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 preserve the right of judicial review despite any right of appeal.

THE STATUTORY APPEAL

Standard of Review

[25] The LAT Act, section 11(6) provides that an appeal from a decision of the Tribunal relating to a matter under the *Insurance Act* may be made on a question of law only. Since this is a statutory appeal on a question of law, the standard of review of that question of law is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37. There is no appeal on questions of fact, or questions of mixed fact and law without an extricable question of law: *Oliver v. Brant Mutual Insurance Company*, 2018 ONSC 3716 (Div. Ct.) at para. 17.

No Error of Law

[26] In her Notice of Appeal, Ms. Yatar identified the following "errors of law":

(1) The Adjudicator erred in law in finding that the January 7, 2011 letter from the Respondent was a valid denial of the income replacement benefit having regard to the February 16, 2011 letter that determined Ms. Yatar was entitled to income replacement benefits and the September 19, 2011 letter denying income replacement benefits.

(2) The Adjudicator erred in law in finding that the January 7, 2011 letter from the Respondent was a valid denial of the housekeeping and home maintenance benefit having regard to the February 16, 2011 letter which states that the insurer has made a determination that she is not entitled to the housekeeping and home maintenance benefit.

(3) On reconsideration, the Adjudicator erred in law in affirming his previous finding that the January 7, 2011 letter constituted a valid denial of the income replacement benefit and the housekeeping and home maintenance benefit.

[27] The Notice of Appeal does not identify any errors of law; it recites findings of fact made by the adjudicator and then baldly asserts that the adjudicator erred in law, without identifying the legal error or any extricable legal principle. In argument, the appellant did not identify a wrong legal standard or principle. All parties accept that the legal principles applied in the decision were correctly set out, in that (1) there must be a clear and unequivocal refusal of benefits; and (2) there must be an adequate written explanation to the insured person of her right to dispute the refusal set out in straightforward and clear language, directed toward an unsophisticated person.

[28] On a statutory appeal limited to questions of law alone, the court considers whether the decision-maker correctly identified and interpreted the governing law or legal standard relevant to the facts found by the decision-maker. There are limited circumstances in which findings of fact, or the administrative decision-maker's assessment of evidence, may give rise to an error of law alone for the purposes of appeal. If the adjudicator ignored items of evidence that the law required him or her to consider in making the decision, then the adjudicator erred in law: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at para. 41. Challenges to the sufficiency or weight of evidence supporting a finding of fact do not give rise to a question of law. An error in law or legal principle made during the fact-finding exercise, however, can give rise to an extricable question of law. A "misapprehension" of the evidence does not constitute an error of law unless the failure is based on a wrong legal principle: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 25 and 29. It is an error of law to make a finding of fact on a material point where the factual finding is based solely on (a) no evidence, (b) irrelevant evidence, or (c) an irrational inference (*Johannson v. Saskatchewan Government Insurance*, 2019 SKCA 52 at paras. 24-25).

[29] If the adjudicator considered all the mandatory or relevant evidence, but reached the wrong conclusion, then the error is one of mixed law and fact. If the adjudicator erred in applying the law (the correct legal standard) to the facts, that is a matter of mixed law and fact: *Southam Inc.* at paras. 41-42.

[30] The issue raised by Ms. Yatar is whether the insurer's January 7, 2011 letter constituted a valid denial of benefits under SABS. The argument is that the LAT reached the wrong conclusion considering all the evidence, which is not a question of law. Whether there has been a valid denial of benefits under SABS on the facts accepted by the LAT is a question of mixed fact and law: *Oliver v. Brant Mutual Insurance Company* at para. 17. The only issues about the triggering of the limitation period were whether the denial was clear and unequivocal, and whether the insured person was advised of her right to dispute the denial: *Smith*, above; SABS, section 54. These are both questions of mixed fact and law. The general question of whether, on the facts as found by the decision-maker, the limitation period had expired is also a question of mixed fact and law: *Longo v. MacLaren Art Centre*, 2014 ONCA 526 at para. 38. There was relevant evidence to support the LAT's conclusion.

[31] In any event, since Ms. Yatar pursued mediation contesting the denial of benefits, she understood, within the limitation period, both that the benefits had been denied and that she had the right to resort to dispute resolution mechanisms, since mediation was one of the dispute resolution mechanisms available to her. Besides the January 7, 2011 letter providing the Dispute Resolution Form, the appellant was advised of her right to dispute the denial of any benefit in 11 further Dispute Resolution Forms sent between January 18, 2011 and January 28, 2014, before the

mediation. The adjudicator held that the limitation period expired in April 2014, ninety days after the mediator's report following the failed mediation.

[32] There is no error of law, and the statutory appeal is dismissed on that basis.

THE JUDICIAL REVIEW APPLICATION

[33] Ms. Yatar has also pursued an application for judicial review. If the errors involve questions of fact or mixed fact and law, then she argues that the remedy lies with an application for judicial review. I first consider the issue of prematurity, then turn to the question of adequate alternative remedy in considering whether to exercise my discretion to hear the judicial review application.

[34] TD raises a preliminary objection to the application for judicial review on the grounds of prematurity. TD argues that the court should decline to consider an application for judicial review from a LAT SABS decision if the applicant has not exhausted all adequate alternative remedies, including the statutory appeal, unless there are exceptional circumstances: *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 at paras. 68-71.

[35] The concern about prematurity is one of timing. Having now disposed of the appeal, this court could decide to hear the judicial review without a prematurity concern.

[36] The LAT statutory appeal on questions of law does not deprive this court of jurisdiction to consider other aspects of a decision in judicial review proceedings: *Vavilov* at paras. 45, 52. The right to seek judicial review from the decision of the LAT is preserved in two ways. First, section 280(3) of the *Insurance Act* prevents recourse to the courts about disputes over an insured person's entitlement to statutory accident benefits, except for appeals from LAT decisions or applications for judicial review. Second, section 2(1) of the *Judicial Review Procedure Act* provides that despite any right of appeal, the court may grant certain remedies on an application for judicial review. This framework reflects the constitutional guarantee of judicial review, as legislatures cannot entirely shield administrative decision-making from scrutiny by the courts: *Vavilov* at para. 24.

[37] Even though judicial review has not been altogether precluded, this court must consider the intention of the Legislature in limiting the statutory appeal to questions of law. In *Vavilov*, the Supreme Court stated that the "polar star" of judicial review is legislative intent, reaffirming the importance of giving effect to the Legislature's institutional design choices about the scope of judicial oversight: *Vavilov* at paras. 33-34 and 36. Judicial review is a discretionary remedy. I set out below factors that I consider in deciding whether to exercise my discretion to hear a judicial review application from a LAT SABS decision where there is no error of law.

[38] The respondent argues that judicial review should be denied on the grounds that the statutory appeal is an adequate alternative remedy. The courts have identified several factors relevant to determining whether an alternative remedy is adequate and so would justify a decision to decline judicial review, often called the *Harelkin/Matsqui* factors. The Supreme Court of Canada in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at para. 42 has summarized these factors to include "the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its

remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost."

[39] The Supreme Court in *Strickland* has further held that "neither the process nor the remedy need be identical to those available on judicial review"; the issue is whether the remedy is adequate in all the circumstances. Courts are to apply a "type of balance of convenience analysis" assessing both the adequacy of the alternative remedy and the suitability and appropriateness of judicial review. The "question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate": see paras. 42-44. A key question is whether the judicial review is appropriately respectful of the statutory framework and the purposes and policies underlying the statutory scheme: *Strickland* at para. 44.

[40] In determining whether to exercise my discretion, I consider several factors.

[41] First, I must give weight to the legislative intent to limit this court's review of LAT decisions on statutory accident benefits to questions of law only, and to allow LAT to "function with a minimum of judicial interference" on questions of fact and mixed fact and law: *Vavilov* at para. 24. I also consider the purposes and policies underlying the statutory scheme. This includes the extensive 2016 revisions to the SABS dispute system which were designed to provide a streamlined response, prioritizing access to justice in a quicker and more efficient manner. This is reflected in the elimination of mandatory mediation at FSCO, the tighter timelines for completion of all steps, the elimination of recourse to the courts, the exclusive jurisdiction of LAT, and the 2016 enactment of the appeal clause restricting appeals to questions of law. While judicial review is preserved by virtue of section 280(3) of the *Insurance Act* and section 2(1) of the *Judicial Review Procedure Act*, the specific legislative intent for LAT SABS decisions is that they may be appealed as of right, making the statutory appeal an expeditious and convenient route which conserves the parties' and judicial resources.

[42] Second, I also consider the breadth of LAT's reconsideration power, which includes errors of fact or law likely to affect the result. The "other forum" to be considered includes both the statutory appeal and the first level reconsideration. That reconsideration is undertaken by a decision-maker with exclusive jurisdiction over SABS decisions. Rule 18.2 of the LAT's *Common Rules* provides that:

> The Tribunal shall not make an order …unless satisfied that one or more of the following criteria are met: (a) The Tribunal acted outside its jurisdiction or violated the rules of procedural fairness; (b) The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made; (c) The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and likely affected the result; or (d) There is evidence that was not before the Tribunal when rendering its decision, could not have been obtained previously by the party now seeking to introduce it, and would likely have affected the result.

[43] Rule 18.4 provides that after reconsideration, the LAT may confirm, vary, or cancel the decision or order, or it may order a rehearing. As set out by Marrocco A.C.J.S.C. in *Taylor v. Aviva*

Canada Inc., 2018 ONSC 4472 (Div. Ct.), although the LAT Rules do not authorize a "wholesale reweighing of evidence", the internal standard of review on reconsideration is akin to correctness: paras. 67 and 70. So there has already been one level of review of the LAT decision by a decision-maker with broad remedial powers.

[44] Third, I consider the nature of the alleged errors in the present application. The errors complained of are questions of fact or mixed fact and law involving the assessment of evidence. Whether on a statutory appeal or on a judicial review, the reviewing court will be highly deferential to the administrative decision maker on these issues. Findings of fact are not immune from judicial oversight – but the court will intervene in a statutory appeal limited to questions of law only if the treatment of the evidence is so seriously in error as to constitute an error of law, as discussed above. On an unrestricted statutory appeal, the court will apply a deferential standard of "palpable and overriding error" to factual findings. On judicial review, the standard of reasonableness on issues of fact-finding and assessment of evidence requires a similarly high standard of deference as set out in *Vavilov* at para. 125:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen* at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

Whether on a statutory appeal limited to questions of law, or on judicial review, the court will be similarly deferential in respect of the type of errors alleged here.

[45] Fourth, I consider the systemic difficulties associated with duplicative judicial reviews and appeals. The concurrent pursuit of two remedies has triggered two sets of procedures and the filing of voluminous materials. Ms. Yatar filed both a judicial review record and a separate appeal record, due to different requirements under the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194. The parties each filed two factums, addressing different issues and different standards of review. The LAT has a right to participate on the judicial review, but not on the appeal unless leave is granted. The time periods set out in the *Rules of Civil Procedure* for filing materials vary between appeals and applications for judicial review. The duplication of materials is a heavy burden on the parties and the court in terms of time, cost and efficiency. These concerns only increase when an application for judicial review is scheduled after an unsuccessful statutory appeal in order to avoid allegations of prematurity.

[46] Taking all the above factors into consideration, I conclude that judicial review of a LAT SABS decision is only available, if at all, in exceptional circumstances. There are no exceptional circumstances here that would lead me to exercise my discretion to judicially review the questions of fact and mixed fact and law raised by the applicant in her judicial review application.

CONCLUSION

[47] The appeal and the application for judicial review are dismissed. The appellant/applicant is to pay the respondent TD Insurance costs in the agreed-upon amount of $7,500.00, all inclusive. LAT neither sought nor is awarded costs.

Kristjanson J.

I agree

Swinton J.

I agree

Penny J.

Date of Release: April 21, 2021

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