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: P.V. vs. Economical Insurance, 2019 ONLAT 19-000069/AABS

Tribunal File Number: 19-000069/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:

P.V.

Applicant

and

Economical Insurance

Respondent

PRELIMINARY ISSUE DECISION

PANEL: **Jesse A. Boyce, Adjudicator**

APPEARANCES:

For the Applicant: Robert H. Littlejohn, Counsel

For the Respondent: Gerald S. George, Counsel

HEARD: **In Writing on: September 13, 2019**

OVERVIEW

[1] The applicant, P.V., was injured in a motor vehicle accident on August 14, 2013. P.V. sought benefits from the respondent, Economical Insurance, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] Economical denied P.V.'s claim for post-104-week income replacement benefits, claiming it denied entitlement when he initially applied for accident benefits following the accident. P.V. disagreed and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for dispute resolution.

[3] A case conference was held, but the parties could not resolve the issues in dispute, prompting this written hearing on a limitation period issue.

PRELIMINARY ISSUE

[4] The following preliminary issue was raised by the respondent:

i. Whether the applicant is barred from proceeding with his claim for income replacement benefits ("IRBs") as he failed to commence his application within two years after the respondent's refusal to pay the amount claimed?

RESULT

[5] I find that P.V. is statute-barred from proceeding with his application for IRBs as the limitation period elapsed following a valid denial by Economical.

BACKGROUND

[6] Following the accident, on August 23, 2013, P.V. applied to Economical for certain accident benefits. Economical provided P.V. with instructions on the documentation it required in order to assess his claim.

[7] At the time of the accident, P.V. was employed and continued to work in a full-time capacity thereafter. As part of his application, P.V. submitted the accompanying forms: an OCF-1 and an OCF-3. Notably, the OCF-3, prepared by P.V.'s family physician, indicated that P.V. was not substantially unable to perform the essential tasks of his employment as a result of the accident, which

[1] O. Reg. 34/10.

is the test required for entitlement to IRBs according to the *Schedule*. P.V. did not submit an OCF-2 from his employer.

[8] On September 12, 2013, Economical determined that P.V. was not eligible to receive income replacement benefits and provided its explanation of benefits package to P.V., who did not dispute the denial.

[9] P.V. continued to work full-time, albeit with certain limitations, for another three years and nine months following Economical's IRB denial. On April 28, 2017, P.V. ceased full-time work and began receiving long-term disability benefits.

[10] On January 17, 2018, P.V. submitted a new OCF-3 to Economical, claiming entitlement to post-104-week IRBs, along with a completed OCF-2 from his former employer. On January 29 and 30, 2018, Economical confirmed receipt of P.V.'s claim and, referring to its previous 2013 denial, advised that its position on IRBs remained the same. P.V. then applied to the Tribunal for resolution of the dispute.

[11] In August 2018, Economical deemed P.V. to be catastrophically impaired based on two marked impairments in the mental and behavioural sphere.

ANALYSIS

The Preliminary Issue

[12] The parties' positions are relatively straightforward: Economical argues that it issued a clear, unequivocal denial of IRBs in its explanation of benefits from 2013, triggering the limitation period and that P.V. did not appeal the denial within two-years. In response, P.V. argues that Economical did not provide a clear, unequivocal denial because it denied IRBs even though it was not his intention to apply for an IRB in his initial application and, further, that he was misled by the instructions provided by Economical. P.V. argues that Economical's alleged denial did not trigger the limitation period because it only addressed whether he was *eligible* at the time of his application and did not consider his *entitlement* to IRBs.

[13] For the reasons that follow, I agree with Economical and find that P.V. is statute-barred from proceeding with his claim for IRBs.

Smith v. Co-operators

[14] It is first important to determine whether Economical's notice of denial was proper in accordance with the principles outlined in *Smith v. Co-Operators*

General Insurance Company.[2] Notices of refusal to pay benefits must contain 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 deemed invalid, and the two-year limitation period is not triggered.

[15] Economical submits it issued a clear and unequivocal denial of IRBs on September 12, 2013 which triggered the limitation period. It points to its letter from that date which conveys the following information: P.V.'s injuries did not prevent him from working, that the OCF-1 prepared by his doctor stated that he can work in his pre-accident job, that Economical determined he was not eligible for IRBs as a result and outlines the dispute resolution process and the relevant time limits that govern the process if P.V. wanted to dispute the decision.

[16] In response, P.V. argues that the "alleged denial" was not a clear and unequivocal denial of the IRBs and no limitation period was triggered on September 12, 2013. He argues Economical's denial is not clear and unequivocal on two fronts. First, he argues the wording contained within the alleged denial is uncertain and ambiguous. Second, he argues Economical's instructions to him, as an unsophisticated applicant, as well as its subsequent actions, created confusion and a lack of clarity.

[17] On the evidence, I find Economical's notice letter to P.V. satisfied the basic requirements of *Smith* because it stated the reasons for the denial of the IRBs (his accident-related impairments do not prevent him from working and the OCF-1 indicates he is not substantially unable to perform the essential tasks of his employment as a result of the accident); it clearly indicates he is not eligible for IRBs; and it provides, in straightforward language, the dispute process available to P.V. if he disagreed. Other than the use of the word "eligible", addressed below, I find nothing to substantiate P.V.'s argument that the denial was in any way uncertain or ambiguous.

The language of a pre-emptive denial

[18] With regards to Economical's use of the word "eligible", P.V. argues that the use of this word in place of "entitlement" indicated to him, as an unsophisticated applicant and on a plain definition, that he was unable to make a claim for the

[2] 2002 SCC 30, at para 14.

benefit and not that he was being denied entitlement to IRBs. P.V. argues it would be impossible for him to know that Economical considered the words "not eligible" to equate to a denial of benefits. Finally, he argues the phrase "not eligible" implies that should his ability to satisfy the IRB test change, he would then have a right to claim IRBs and have his entitlement determined. I disagree.

[19] There is a considerable body of case law that deals with premature benefit claims and with claims that are denied pre-emptively by an insurer. I find that a benefit can be denied by an insurer pre-emptively and that the use of the term "eligibility" has been found to be acceptable under the *Schedule*. Notably, in *Bonaccorso v. Optimum Insurance Company Inc.*[3], the Court of Appeal held that an insurer's premature denial of a benefit may still be considered proper and trigger the two-year limitation period even when an applicant had not yet applied for a specific benefit, or where entitlement to a benefit had not crystalized. I find this provides appropriate guidance on the facts before the Tribunal. Despite P.V.'s contention that he was not applying for IRBs at the time, Economical did nothing out of the ordinary when it denied IRBs, as it had an application in hand and information before it that P.V. would not qualify.

[20] Further, I find the facts of this matter are similar to those in *Sietzema v. Economical Mutual Insurance Company,*[4] where the applicant argued that the limitation period had not been triggered by a denial when the insurer advised the applicant they were "not eligible" for a non-earner benefit. The Court of Appeal found the "not eligible" language used by the insurer to be a clear denial, triggering the limitation period. Put another way: the requirement to provide notice of refusal to pay certain benefits is not dependent on specific wording such as "denial" or, as P.V. argues in this case, "not entitled." The Tribunal has held that a refusal can take many forms, for example: a "refusal" to pay benefits or a "termination" of benefits or it may take the form of an explanation that reaffirms the language of the *Schedule*. Other terms that have been deemed acceptable by the Tribunal include "reduction," "stoppage," and "suspension" of benefits. Here, I find the use of "not eligible" by Economical to be in line with jurisprudence and to be a clear indication of a denial and, ultimately, a refusal to pay benefits.

[21] Additionally, the *Sietzema* Court found the fact the applicant had counsel on the file—as P.V. has had since November 2013 in this case—to advise her of her rights, that it shielded any perceived ambiguities in the language because counsel would have known that a limitation period applied and would,

[3] 2016 ONCA 34.
[4] 2014 ONCA 111.

presumably, have known that the inclusion of appeal instructions meant that it had been triggered. Despite P.V.'s contention that he was an unsophisticated applicant that did not know he was applying for IRBs and was unclear on the meaning of "eligible", I find the presence of counsel in November 2013 undermines this position. In any event, I follow the direction provided by *Sietzema* and other jurisprudence and find that the use of the word "eligible" constitutes a denial, triggering the limitation period.

[22] P.V. also argues that the instructions provided by Economical were unclear and misleading. He argues that because he did not include a completed OCF-2 with his initial application for benefits, that it was an indication he was not seeking IRBs and therefore, any denial was improper. P.V. argues he only "complied" with Economical's instructions to apply for IRBs on January 16, 2018, when he submitted the OCF-3 and the OCF-2.

[23] I disagree. An OCF-2 is not required to complete an application for IRBs because an OCF-2 only assists the parties in calculating the quantum of benefits if an applicant is eligible. An application for IRBs is complete when an OCF-1 and OCF-3 are submitted and the relevant boxes are checked. As noted, *Bonnacorso* allows an insurer to decide on a benefit prematurely. On receipt of the OCF-1 and OCF-3, completed by P.V. and his physician, I find Economical was within its rights to decide on IRBs, which P.V. would have been free to dispute but did not. While I am alive to P.V.'s contention that the process may have been confusing, I again note that he retained counsel at an early stage in November 2013, shortly after the denial. If anything was misleading or improper at the time, I find it reasonable to presume that counsel would have acted to correct it. There is no evidence this occurred.

[24] Further, even if P.V. was successful on the limitation period argument, I find it likely he would have some difficulty with the limitation period hurdle presented by sections 4 and 5 of the *Schedule* as it pertains to IRBs, because the Court of Appeal has held that if an applicant did not obtain a determination of entitlement during the first 104 weeks after the accident, they will be precluded from seeking IRBs after 104 weeks despite a deteriorating condition.[5] Instead, over four years elapsed between Economical's denial of September 12, 2013 and P.V. submitting the OCF-3 and OCF-2 on January 16, 2018. While the Tribunal is sympathetic to what P.V. has endured in the years in between, I find this is well beyond the limitation period and P.V.'s application is statute-barred.

Section 7 of the Licence Appeal Tribunal Act

[5] *See, for e.g., Wadhwani v. State Farm Mutual Automobile Insurance Company*, 2013 ONCA 662, at para 12.

[25] Section 7 of the *Licence Appeal Tribunal Act*[6] ("*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 the Tribunal weighs in determining whether the justice of the case requires 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.[7] These 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 facts of each case.[8]

[26] Having determined that Economical's denial was valid, justice still requires that the Tribunal consider whether an extension of the limitation period should be granted. I find P.V. has not provided a compelling reason why the extension of the limitation period should be granted under section 7.

[27] First, while he maintains the argument that he did not apply for IRBs, I find P.V. had no *bona fide* intention to appeal the denial within the limitation period as P.V. continued to work full-time following the accident for over three years and then did not apply for IRBs until he was terminated, which was over four years following Economical's denial. Second, I find the length of the delay in acting on the IRB—four years following the denial—to be in significant excess of what has been deemed permissible by the Tribunal. P.V.'s explanation for the delay was that he did not believe there had been a denial, which I disagree with as I explained above. Third, the potential for prejudice almost always weighs in favour of the applicant. Here, the prejudice to P.V. is obvious, as he will be barred from proceeding with an application for a benefit. However, there is also prejudice to Economical in the undermining of the certainty of a limitation period and the burden of defending against an additional claim after several years without medical assessments. Fourth, although I find it is not enough to tip the balance in P.V.'s favour, I accept that there may be merit to his claim for post-104-week IRBs given his catastrophic designation. Unfortunately, in my view, this factor is not enough to outweigh the significant delay that followed a valid denial.

[6] 1999 S.O. 1999, Ch. 12, Sch. G, at s. 7.
[7] *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002*, 2012 ONSC 1492 (CanLII).
[8] *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.

[28] Accordingly, for these reasons, the Tribunal declines to exercise its discretion under section 7 of the *LAT Act* to extend the limitation period.

CONCLUSION

[29] I find Economical provided P.V. with a valid denial. The denial was clear and unequivocal and provided P.V. with the requisite information to determine whether to dispute the denial while also triggering the limitation period.

[30] I find P.V. is statute-barred from proceeding with his application for IRB at the Tribunal and decline to extend the limitation period under section 7 of the *LAT Act*.

Released: September 23, 2019

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Jesse A. Boyce
Adjudicator