2018 CarswellOnt 19833
Ontario Licence Appeal Tribunal

17-005685 v. Economical Mutual Insurance Company

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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

A.C. (Applicant) and Economical Mutual Insurance Company (Respondent)

Avvy Go Adjud.

Heard: March 19, 2018
Judgment: June 6, 2018
Docket: 17-005685/AABS

Counsel: James Srebrolow, for Applicant
Catherine Korte, Anthony H. Gatensby, for Respondent

Headnote
Insurance --- Automobile insurance — No-fault benefits — Other benefits — Non-earner benefits
Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits — Limitation period

***Avvy Go Adjud.*:**

OVERVIEW

1 The applicant, A.C., was injured in a motor vehicle accident on August 21, 2014. The applicant was taken to a local hospital via ambulance to examine his complaint of chest and neck/back pain. He was then discharged home with medication.

2 Prior to the accident, the applicant had a medical history of prostate cancer, dysphagia and hypertension. In October 2015, the Applicant was diagnosed with malignant lymphoma and was admitted to the hospital for treatment. He was then diagnosed on February 22, 2017 with having frozen shoulder. On April 8, 2017, the Applicant's physician diagnosed him with Complex Regional Pain Syndrome.

3 Sometime after the accident, the applicant retained counsel and applied for non- earner benefits (NEB) under the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (*Schedule*). The respondent issued a denial of the NEB on February 17, 2015. After retaining his current counsel, the applicant filed an application to the Licence Appeal Tribunal (Tribunal) on August 29, 2017, appealing the respondent's February 17, 2015 denial of the NEB.

4 A case conference was held by the Tribunal on December 15, 2017. The Tribunal ordered a written hearing to deal with a preliminary issue.

ISSUES

5 By an order dated December 15, 2017, the Tribunal ordered a written hearing to determine the following preliminary issue:

i. Is the applicant statute barred from seeking a non-earner benefit pursuant to section 56 of the *Schedule* [1] ?

RESULT

6 I find that the applicant is statute barred from seeking a non-earner benefit.

THE LAW AND ANALYSIS

7 Section 56 of the *Schedule* states that an application to this Tribunal in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed.

8 The parties agreed that the respondent stopped the NEB by way of correspondence dated February 17, 2015, on the basis of an Insurer's Examination (IE) by Dr. Gwardjian and Mr. Dhirayain. The applicant also did not take issue with respect to the validity of the notice of the denial. Pursuant to s.56, the two-year limitation expired on February 17, 2017.

Discoverability Rule

9 The applicant asked the Tribunal to apply the discoverability rule to his application which would have the effect of delaying the 2 year limitation period until he discovered that he was suffering from Complex Regional Pain sometime in February, 2017. For the reasons set out below, I find the discoverability rule does not apply to applications before this Tribunal.

10 The applicant submitted that he was first diagnosed with Complex Regional Pain Syndrome/Frozen Shoulder/Shoulder Hand Syndrome on February 22, 2017. Prior to that date, the applicant was undergoing treatment for his cancer, which was masking the severity of the injuries from the accident. The applicant argued that the cancer and its treatment delayed the diagnosis of the Complex Regional Pain Syndrome, a diagnosis that would substantiate a complete inability to live one's normal life and lead to a determination that his injuries are more than just soft issue injuries, as indicated by the IE.

11 The applicant cites the Supreme Court of Canada decision in *Peixeiro v. Haberman*,[2] where the Court held that the discoverability rule applies in order to postpone the running of the two year limitation period until the material facts, including the extent of the injuries, are known or should have been known by the applicant.

12 Relying on *Peixeiro*, the applicant submits that the discoverability rule is a rule of statutory construction, and as such is a principle of general application that should be applied in the context of the *Schedule* and the *Insurance Act*, as opposed to a common law derived from the court's inherent or equitable jurisdiction.

13 The respondent argues that the principle of discoverability is a reference to a specific provision which exists under a separate statute, i.e. the *Limitations Act*, 2002,[3] which applies to actions commenced in the Ontario Superior Court of Justice, and not to a claim of statutory accident benefits commenced by way of appeal to the Tribunal, and as such is ousted by the complete code of the *Schedule*.

14 Having reviewed the SCC's decision in *Peixeiro v. Haberman*, I respectfully disagree with the applicant's interpretation of the case. In *Peixeiro*, the Court was dealing with the applicability of the discoverability rule to actions that do not otherwise fall under the "no fault" insurance scheme. Nowhere in the decision did the Court suggest that the discoverability rule is equally applicable to insurance claims that would otherwise be dealt with by the no-fault system.

15 I also find support for my conclusion from the reasoning in the Tribunal decision *16-003034 v. Economical Mutual Insurance Company* [2017 CarswellOnt 14363 (Ont. L.A.T.)],[4] in which Vice Chair Trojek rejected a similar argument made by the applicant and found that sections 279 to 283 of the *Insurance Act* form "the complete scheme for the resolution of all disputes concerning benefits and that the doctrine of discovery and the *Limitation Act*, 2002 do not apply".

Incapacitation

16 The applicant submits that the limitation period should be extended as a result of his mental incapacity during his hospitalization and subsequent cancer diagnosis. He argues that the limitation period should be extended to August 2016, as he

had been suffering from declining health and was mentally incapacitated from October 2015 until August, 2016. However, the applicant did not cite any case law or refer to any statutory provision in support of his argument for an extension.

17 The respondent cited several Tribunal decisions, arguing that the "bright-line test" has been used by the Tribunal on numerous occasions, applying the two-year limitation period under s.56 of the Schedule with no discretion. [5]

18 I do note that s.7 of the *Licence Appeal Tribunal Act*, 1999 [6] gives the Tribunal power to extend the time, despite any limitation of time fixed by or under any Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief. However, neither party referred to this provision in their argument.

19 The respondent did however refer to *16-001976 v. Co-operators General Insurance Company* [7] and I note the member in that case made this *obiter* comment with respect to the Tribunal's discretionary power to extend limitation period:

> The *Schedule* is consumer protection legislation. The limitation period prevents an applicant from having the opportunity to make their case before an independent adjudicator. I make no determination on whether I can relax the limitation period due to the switch from FSCO to the Licence Appeal Tribunal. To the extent that this power exists, however, this is not the case in which it applies.

20 Assuming that I have the discretion to extend the limitation period pursuant to s.7 of the *Licence Appeal Tribunal Act*, I find that this is not a case in which I am prepared to exercise my discretion. While the applicant submitted that he was incapacitated due to mental condition, I agree with the respondent that the applicant's entire argument on this issue rests on a statement from his former counsel stating that "we will need some time before we can take instructions as to your request". Apart from evidence supporting that the applicant was under cancer treatment, there is no evidence that the cancer or the treatment has rendered the applicant incapacitated between October 2015 and August 2016. Further, there is no evidence that the cancer treatment masked the severity of the injuries from the accident. And if the applicant were in fact incapacitated during that time, there was no evidence that his substitute decision maker, if any, was not in a position to give instructions to his former counsel on how to proceed with his insurance claim.

21 In conclusion, given the lack of evidence supporting the applicant's claim that he was incapacitated for eight months during the two-year limitation period, I find that there is no basis to extend the limitation period.

22 I note the applicant made substantive arguments about his eligibility for NEB. I have not considered his arguments on that issue, as I find they are not relevant to the determination of this preliminary issue.

Costs

23 The respondent has asked for costs, arguing that the applicant has no chance of success, given the clarity of the case law.

24 The Tribunal's *Rules of Practice and Procedure* allow a party to make a request for an award of costs where an application is determined to be unreasonable, frivolous, vexatious or in bad faith. Just because I have found in favour of the respondent, it does not mean I find his application to be unreasonable, frivolous, vexatious, or made in bad faith. I am not convinced the case law is as clear cut as the respondent suggests. As such, I do not find this is an appropriate case to make an award of costs against the applicant.

ORDER

25 The Tribunal finds the applicant is statute barred from seeking a non-earner benefit.

Footnotes

1 Note that in the applicant noted the issue and referenced subsection 282(2) of the *Insurance Act* which is where the 2 year limitation period was previously referenced in addition to the Schedule.

2 [1997] 3 S.C.R. 549 (S.C.C.)

3 S.O. 2002, c.24, Sched. B.

4 *Supra*, note 3.

5 *16-000212 v. State Farm Mutual Automobile Insurance Co.* [2016 CarswellOnt 21531 (Ont. L.A.T.)], 2016 CanLII 10380

6 S.O. 1999, C. 12, Sch. G

7 *16-001976 v. Co-operators General Insurance Company* [2017 CarswellOnt 5095 (Ont. L.A.T.)] 2017 CanLII 19198, upheld on reconsideration