

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Citation: [R.C.] v. Intact Insurance Company, 2020 ONLAT 18-010864/AABS

Released Date: February 5, 2020

File Number: 18-010864/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:

[R.C.]

Applicant

and

Intact Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Marisa Victor

APPEARANCES:

For the Applicant: Nicole Corriero, Counsel

For the Respondent: Antonietta Alfano & Nergiz Sinjari, Counsel

HEARD: In Writing July 8, 2019

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] The applicant, [R.C.], was involved in an automobile accident on January 10, 2014, and sought income replacement benefits (“IRBs”) from the respondent (“Intact”) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*.
- [2] Intact initially denied that applicant’s claim for IRBs effective August 11, 2014. The applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”) to appeal the denial on November 20, 2018.
- [3] The respondent takes that position that the application before the Tribunal is statute-barred having been commenced more than two years after the denial.

ISSUE

- [4] The following issue is in dispute:
 - i. Is the applicant’s claim for IRBs in the weekly amount of \$173.37 per week from August 12, 2014 to date and ongoing statute-barred pursuant to section 56 of the *Schedule* and section 280(2) of the *Insurance Act* as he failed to commence arbitration within two years of the denial of the IRBs?

RESULT

- [5] The applicant’s appeal is statute-barred.

IS THE APPLICANT STATUTE-BARRED FROM APPLYING TO THE TRIBUNAL TO DISPUTE THE IRB DENIAL?

The Law

- [6] Section 56 of the *Schedule* states that an application before the Tribunal in respect of a benefit shall be commenced within two years after the insurer’s refusal to pay the amount claimed.
- [7] The onus is on the respondent to show that the limitation period under the *Schedule* has expired.
- [8] Section 7 of the *Licence Appeal Tribunal Act* (“LATA”) allows for an extension of time despite the limitation period in the *Schedule* “if the Tribunal is satisfied that

there are reasonable grounds for applying for the extension and for granting relief.”

- [9] The onus is on the applicant to establish reasonable grounds for an extension under s. 7 of *LATA*.

Key Dates

- [10] The following are the key dates:
- a. January 10, 2014 - the applicant is involved in a motor-vehicle accident.
 - b. February 7, 2014 - applicant submits OCF-1 and OCF-3 to the respondent including a claim for IRBs.
 - c. March 3, 2014 - IRBs initially approved.
 - d. March 4, April 2, April 30, June 6, 2014 - Respondent’s forensic accountants contact applicant and request documents to support self-employment income and IRB calculation. Applicant does not provide requested documents.
 - e. May to June, 2014 - Applicant attends insurer’s examinations (“IE”) to address ongoing entitlement to IRBs. IEs conclude the applicant does not suffer a substantial inability to perform the essential tasks of his pre-accident employment as a renovator or electrician.
 - f. August 5, 2014 - Respondent denies further IRBs effective August 11, 2014.
 - g. October 24, 2018 - Applicant provides the respondent with an IRB calculation report.
 - h. October 30, 2018 - Respondent denies applicant’s claim for IRBs from date of denial and on-going. Respondent provides lump sum payment for IRBs from January 17, 2014 to August 11, 2014 only.
 - i. November 20, 2018 - Applicant applies to the Tribunal for dispute resolution of the IRB claim for IRBs from August 12, 2014 and on-going.

Respondent’s Evidence & Submissions

- [11] The respondent has raised the preliminary issue that the applicant’s appeal is statute-barred under the *Schedule* and cannot be extended through *LATA*.

The Appeal Is Statute-Barred Under The Schedule

- [12] The respondent submits that the applicant is in contravention of s. 56 of the *Schedule* as the applicant failed to initiate dispute resolution within two years of the respondent's August 11, 2014 denial of IRBs.
- [13] The respondent submits that the plain reading of s. 56 of the *Schedule* means that the applicant had two years until August 11, 2016 to pursue a dispute before the Tribunal. Furthermore, there are no exceptions to the limitation period available within the *Schedule*.
- [14] The respondent states that there was a clear and unequivocal denial of benefits and relies on the requirements as set out in *Smith v Cooperators General Insurance Co.*,¹ and *Golic v ING Insurance Company*.² The respondent states that the denial in this case was straight forward and contained clear language, explained the right to dispute resolution and the two-year limitation period effective August 11, 2014.
- [15] The respondent also relied on Tribunal decisions that have followed the strict enforcement of the two-year limitation period in light of a clear denial.³
- [16] The respondent submits that the Tribunal has previously held that where an insurer continues to request documentation after a benefit has been denied, this does not reset the limitation clock. Even in those cases, the strict enforcement of the two-year limitation period continues when the denial of the benefit, and not the quantum, has been clear.⁴ In this case, the respondent submits that the continuing request for IRB documentation and the lump sum payment on October 30, 2018, for the period from the accident to August 11, 2014, does not reset the limitation period regarding IRB entitlement for August 12, 2014 onward.

The Tribunal Should Not Extend The Limitation Period

- [17] The respondent submits that while s. 7 of *LATA* allows the Tribunal to extend a limitation period under certain circumstances, the four required factors are not met in this case. Namely:

¹ 2002 SCC 30

² (2009) 98 O.R. (3rd) 394 (ONCA)

³ *A.G. v Certas Home and Auto Insurance*, 2017 ONLAT 17-001475/AABS & 17-001477/AABS; *J.V. v. Economical Insurance Company*, 2019 ONLAT 18-001145/AABS; *Applicant v State Farm*, 2018 ONLAT 17-008613.AABS; *Stewart v Intact Insurance Company*, 2019 ONLAT 18-004416/AABS

⁴ *N.K. v Intact Insurance Company*, 2018 ONLAT 17-007991/AABS

- a. The applicant cannot show a bona fide attempt to appeal the denial within the appeal period;
- b. The length of delay is substantial, nearly two years after the expiry of the limitation period;
- c. The prejudice to the applicant should not be determinative of an extension which would prejudice the respondent; and
- d. The appeal has no merit given that the denial was proper.

[18] Given the above, the respondent argues that the applicant's appeal before the Tribunal is statute-barred.

Applicant's Evidence & Submissions

[19] The applicant takes the position that the August 5, 2014 denial letter was not proper as the respondent failed to properly investigate the claim prior to issuing the denial. As a result, the limitation period did not begin to run until the subsequent proper denial issued October 30, 2018. In the alternative, the applicant states that he is entitled to an extension as he was unaware his counsel at the time of the August 2014 denial was not retained to represent him in relation to accident benefits.

The Limitation Period Under The Schedule Has Not Expired

[20] The applicant argues that the August 5, 2014 denial letter was based on an incomplete application and is therefore void. The applicant argues that an insurer cannot consider an application for benefits complete without doing its own investigation. The applicant states the respondent failed to request the applicant's medical records and failed to complete an IRB calculation report prior to issuing the denial.

[21] The applicant states that there was medical information available, but that as an unknowing self-represented person, the applicant had only provided evidence to his counsel at the time and did not know this was not provided to the respondent. The applicant states that, in addition, the denial letter shows that the insurer delegated the adjusting decision to a third party (the IE examiner).⁵ The applicant also points to medical evidence reports from the years 2017 to 2019 showing worsening carpal tunnel syndrome, depression and chronic pain. The applicant

⁵ Relying on *Cowans v Motors Insurance Corp.* [2010 CarswellOnt 8176] (FSCO Arb) ("Cowans")

argues that the only proper denial occurred in October 2018 when the respondent was equipped to make a decision.

- [22] The applicant argues that, in the alternative, if fresh evidence is submitted in an accident benefit claim, the respondent owes a duty of care to assess and re-evaluate their decision. The applicant states the 2017-2019 reports call into question the respondent's first denial. The applicant states that these later medical documents resulted in the approval of IRB entitlement from the accident to August 11, 2014. The applicant states that the new evidence should renew an accident benefit claim.
- [23] The applicant also argues that the two-year limitation period in s. 56 of the *Schedule* is only triggered when there is evidence of the quantum of the IRBs being claimed and a denial of that quantum. In this case, since the amount was unknown due to lack of evidence, the limitation period had not yet begun because there was no denial of an "amount claimed."

The Tribunal Should Extend the Time Period to Appeal

- [24] Finally, the applicant states that the application of s. 7 of *LATA* supports the extension of the limitation period. This is because the applicant meets the four factor test as follows:
- a. He had a bona fide intention to appeal within the appeal period but deferred to his counsel to manage the case and make decisions. On discovering, in 2018, that his legal representatives had not appealed within the deadline, he sent multiple emails to his counsel complaining of this lapse. He did not communicate his intention to appeal to the respondent or begin appeal proceedings due to an unfortunate misunderstanding regarding the role of his counsel.
 - b. The appeal was filed two years after the expiry of the limitation period. Upon learning that the respondent was maintaining its denial after the receipt of the updated medical evidence, the applicant moved quickly to apply to this Tribunal. It was reasonable to wait until the respondent had reviewed the new information especially as this resolved the initial IRB period from January 17, 2014 to August 11, 2014.
 - c. The respondent is not prejudiced. The applicant should not be penalized because the respondent did not avail itself of s. 44 assessments and other investigative opportunities available under the *Schedule*. On the other hand, failure to extend the limitation period would prejudice the

applicant who has suffered debilitating impairments to his wrists and hands which have affected his work as an electrician.

- d. The grounds for IRB entitlement are “at least arguable”⁶ given the pre-104 and post-104 medical evidence showing carpal tunnel syndrome, depression and related symptoms, chronic pain and the applicant’s complete inability to carry on a normal life.

[25] The applicant also states that the extension should be granted using the governing principle that the justice of the case requires it.

Analysis

[26] The respondent issued a valid denial letter on August 5, 2014, effective August 11, 2014. The appeal before the Tribunal was commenced more than two years after the expiry of the two-year limitation period. The applicant has not established reasonable grounds for an extension under s. 7 of *LATA*.

The Limitation Period In The Schedule Began To Run In August 2014 And Has Expired

[27] The respondent’s denial letter on August 5, 2014 was sent directly to the applicant and was clear and supported.⁷ Prior to issuing the denial, the respondent requested information from the applicant to support the IRB calculation, but none was forthcoming. Letters requesting IRB calculation were written from the respondent and the respondent’s forensic accountant directly to the applicant and not his legal counsel.⁸ The respondent also requested that the applicant attend three IEs that addressed IRB entitlement.⁹ The applicant attended these IEs in 2014 prior to the denial. The applicant therefore was receiving communications directly from the respondent and was responding to the respondent. The respondent also had medical evidence from the IEs upon which to make a decision on the applicant’s entitlement to IRBs. It made such a decision and communicated it to the applicant on August 5, 2014.

[28] The denial of IRBs was valid even though the quantum claimed was unknown. While previous Tribunal decisions are not binding on me, I find it persuasive that a denial of a benefit, and not the denial of the quantum of a benefit, is required for a clear and unequivocal denial.¹⁰ The fact that the quantum of the IRB

⁶ Relying on *Boone v Advantage Car & Truck Rentals Ltd.* 2008 CarswellOnt 6234 at para 9.

⁷ See Respondent’s Document Brief, tab 9.

⁸ See Respondent’s Document Brief, tabs 4 -6.

⁹ See Respondent’s Document Brief, tab 7.

¹⁰ See *J.W. v TD Home and Auto Insurance Company*, 2018 ONLAT 18-000918/AABS

benefits claimed was unknown does not invalidate the denial of the IRB benefit for August 12, 2014 onward. Nor does it mean that documents supporting the calculation of IRBs up to August 11, 2014, received after the expiry of the limitation period, reset the limitation period in regard to the August 12, 2014 onward.

- [29] I do not find that the respondent delegated its authority in rendering its decision. Unlike *Cowans*, relied on by the applicant, there was no opposing medical evidence that the respondent ignored. Nor is there evidence that the respondent delegated its authority to the medical practitioners conducting the IEs.
- [30] The applicant's submissions fail to establish that the denial was void on the basis that the respondent failed to obtain the applicant's medical records. It would lead to an untenable situation if the applicant could rely on his own failure to provide medical information to show that the respondent's denial was void due to lack of that information.
- [31] I cannot find any merit to the argument that fresh evidence filed post expiry of the limitation period should result in the respondent's duty to re-open and re-assess the case. This argument is unsupported by the plain reading of the legislation or relevant case law, and contrary to the purpose of a limitation period.
- [32] Limitation periods provide finality and certainty. The applicant failed to appeal within the two-year limitation period and his appeal is therefore statute-barred.

The Tribunal Will Not Use LATA To Extend The Time Period Allowed To Appeal

- [33] Section 7 of *LATA* allows for brief discretionary extensions when fairness and justice requires it. The applicant asks for the extraordinary remedy that a more than two-year extension be granted due to the applicant's mistaken belief his legal counsel was representing him in his accident benefit dispute. The applicant has provided no case law or Tribunal decisions where similar extraordinary extensions were granted under any circumstances.
- [34] The applicant's argument that he meets the four factors required to use s. 7 of *LATA* falls short:
- a. The applicant argues he had a bona fide intent to appeal within the appeal period with post limitation period email evidence showing he was upset when he learned his previous legal representation was not representing him in relation to his accident benefits. He provides no

evidence of following up with his counsel regarding IRB entitlement during the appeal period.

- b. The prejudice to the respondent is significant if a file long-closed could be reopened years later based on an error by the applicant of which the respondent had no knowledge or control over.
- c. The applicant's evidence purporting to show his appeal has merit, instead shows that his chief concern relates to a surgery for carpal tunnel syndrome which may have caused him further problems. The medical evidence does not support that this complaint was caused by the motor vehicle accident. His medical records from 2017 also indicate that he has continued to work as an electrician despite his pain which again undermines the merit of his appeal regarding IRB entitlement.

[35] I find that the applicant has failed to show that he had an bona fide intention to appeal during the appeal period, the prejudice to the respondent of a two-year extension is unsurmountable, and the applicant's appeal lacks merit. The applicant has failed to meet the factors that would permit me to use my discretion to grant an extension under s. 7 of the *LATA*.

ORDER

[36] The applicant's appeal of his IRB denial is statute-barred. The appeal is dismissed.

Released: February 5, 2020

**Marisa Victor
Adjudicator**