

**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: S.J. vs. Allstate Canada, 2020 ONLAT 19-001156AABS**

**Released Date: 07/14/2020  
File Number: 19-001156/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:

**S.J.**

**Applicant**

and

**Allstate Canada**

**Respondent**

**PRELIMINARY ISSUE DECISION**

**ADJUDICATOR:** Sandeep Johal

**APPEARANCES:**

Counsel for the Applicant: Yoni Silberman

Counsel for the Respondent: Lisa Quan

**Heard:** By way of written submissions

## OVERVIEW

- [1] The applicant was injured in an automobile accident on July 12, 2013 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*<sup>1</sup> (the "Schedule").
- [2] The applicant was receiving an attendant care benefit ("ACB") which was subsequently denied on July 22, 2016.
- [3] The parties executed a partial release for various benefits including ACB up to May 11, 2017.
- [4] On June 28, 2018 a treatment and assessment plan was submitted for the cost of an Attendant Care Re-Assessment Form. On July 4, 2018 the respondent denied the treatment plan because ACB was previously terminated on July 22, 2016.
- [5] On October 4, 2018 a new Attendant Care Form-1 was submitted seeking monthly ACB's in the amount of \$826.58 which was denied by the respondent on October 10, 2018.
- [6] The applicant disagreed with these denials and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") dated January 10, 2019.
- [7] The respondent's position is that the ACB was terminated on July 22, 2016 and the Tribunal Application to dispute the denial was submitted more than two years later on January 10, 2019 and the applicant is therefore statute-barred.

## PRELIMINARY ISSUE

- [8] The preliminary issue is whether the applicant is statute barred from bringing this application to the Tribunal to dispute the ACB denial as it was not disputed within the two year limitation period as per section 56 of the *Schedule*.

## RESULT

- [9] The applicant's appeal of the ACB was filed beyond the two-year limitation period, however I find that under s. 7 of the *Licence Appeal Tribunal Act*,<sup>2</sup> the

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<sup>1</sup> O. Reg. 34/10.

<sup>2</sup> S.O. 1990, c.12 ("LAT Act").

justice of the case requires the limitation period to be extended. The applicant is entitled to dispute the ACB denial at the Tribunal.

## ANALYSIS

- [10] Section 56 of the *Schedule* sets out that the application to dispute a denial of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed.
- [11] The respondent's position is that its denial dated July 22, 2016 was a valid refusal that provides a clear and unequivocal denial which gave reasons for the denial and provided a description of the dispute resolution process. According to the respondent, its denial was in accordance with *Smith v. Cooperators*,<sup>3</sup> in that it was straightforward and in clear language directed towards an unsophisticated person.
- [12] The applicant's position is that the denial was not a clear and unequivocal denial of the ACB past May 11, 2017, which was the date the parties settled the applicant's past ACB claim. The applicant submits the respondent is estopped from relying on the limitation period triggered by the July 22, 2016 denial because it agreed to settle past benefits and that future benefits including ACB remained open beyond May 11, 2017.
- [13] In the alternative, the applicant submits the Tribunal should apply its discretion pursuant to s. 7 of the *Licence Appeal Tribunal Act*,<sup>4</sup> or award relief from forfeiture pursuant to s.129 of the *Insurance Act*.<sup>5</sup>
- [14] The respondent relies upon the following in support of its position that its denial was a valid denial that started the limitation clock.
- The limitation period is triggered by a single event, which is the refusal of an insurer to pay the [benefit] claimed.<sup>6</sup>

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<sup>3</sup> 2002 SCC 30 at para. 14.

<sup>4</sup> 1990, S.O. 1999, c. 12, Sch. G. ("LAT Act")

<sup>5</sup> R.S.O. 1990, c I.8.

<sup>6</sup> *Bonilla v. Preszeler*, 2016 ONCA 759 at para. 10.

- A refusal may be premature and include benefits the applicant has yet to apply for and even if the denial is legally incorrect, that is sufficient to trigger the limitation period.<sup>7</sup>
- In determining whether a claim is statute-barred, the Tribunal's job is to scrutinize only the refusal and ask whether the denial is clear and unequivocal.<sup>8</sup>
- An insurer's reassessment of a denied benefit is part of its ongoing obligation to adjust the file and does not give rise to a new limitation period.<sup>9</sup>
- The Tribunal lacks the authority to grant an equitable remedy such as estoppel or relief against penalties and forfeiture.<sup>10</sup>

[15] Upon review of the denial letter dated July 22, 2016, I find it to be clear and unequivocal and in accordance with the *Schedule* and the principles of *Smith*. The letter contained straightforward and clear language which stated that "based on the attached Form 1 dated July 4, 2016 which is assessed at \$0.00 per month, there is no further eligibility for attendant care services."<sup>11</sup> The language is simple, (no further eligibility) and it outlined the dispute resolution process stating the relevant time limits that govern the dispute process including the two-year warning notice which was in bold and displayed prominently on the page entitled "FOR DISPUTES FILED ON OR AFTER APRIL 1, 2016:"

[16] The applicant submits the denial was not clear and unambiguous because it failed to advise of the changes to the dispute resolution process given that the applicant had an ongoing dispute proceeding under the Financial Services Commission of Ontario (FSCO). Also because the respondent made a settlement payment for the ACB up to May 11, 2017 which was made prior to the expiry of the limitation period and therefore the limitation period is rescinded until the respondent sends a further clear and unequivocal denial. The applicant relies upon the Tribunal case of *S.S. v. Economical Mutual Insurance*

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<sup>7</sup> *Bonaccorso v. Optimum Insurance Company Inc.*, 2016 ONCA 34 at para. 19; *Sietzma v. Economical Mutual Insurance Company*, 2014 ONCA 111 at paras. 12-13; *S.S. v. Economical Mutual Insurance Company*, 2019 CanLII 83592 (ON LAT Reconsideration Decision) at para. 18.

<sup>8</sup> *S.R. and Aviva Insurance Canada*, 2018 CanLII 13157 (ON LAT) at para. 26.

<sup>9</sup> *M.S. v. Economical Mutual Insurance Company*, 2019 CanLII 72216 (ON LAT Reconsideration Decision) at paras. 12-19.

<sup>10</sup> *A.A. v. Unifund Assurance Company*, 2019 CanLII 51323 (ON LAT) at para. 24; *K.W. v Unifund Assurance Co.*, 2017 CanLII 148400 (ON LAT) at para 37; *M.F. v. Belair Direct*, 2017 CanLII 19200 (ON LAT) at para. 26; *Y. D. v. Aviva Insurance*, 2017 CanLII 43883 at paras. 68-72.

<sup>11</sup> Written Submissions of the Applicant at Tab 1.

*Company*,<sup>12</sup> and the Court of Appeal decision of *State Farm Mutual Automobile Insurance Co. v. Dominion of Canada General Insurance Co.*<sup>13</sup> in support of his position.

- [17] In my view, I am not persuaded by the applicant's submissions because as of the date of the denial letter (July 22, 2016) the jurisdiction to dispute accident benefits had already changed to the Tribunal from FSCO and therefore the dispute resolution process information was correct. The applicant has not directed me to any evidence that the respondent was under any obligation to notify applicants who may have had previous proceedings under FSCO that the jurisdiction has changed to the Tribunal. In any event, even if the denial is legally incorrect, that does not stop the limitation period from running.<sup>14</sup>
- [18] The case law that the applicant relies upon, the S.S. case and the *State Farm v. Dominion* case, is in support of his position that that a settlement payment can extend the limitation period, however I find that the cases are distinguishable because in S.S. the respondent, after denying the applicant's ACB claim subsequently paid retroactive and subsequent ongoing ACB which was found to reverse the prior denial; and in *State Farm v. Dominion*, that case involved an indemnification dispute between insurers with respect to the degree of fault of each insurer's insured as determined under the fault determination rules.<sup>15</sup> In the present case, the applicant was paid a settlement amount for past ACB and it was not an ongoing payment of ACB as in S.S. *State Farm v. Dominion* was not an accident benefits case. As a result, I do not find these cases to support the applicant's position.
- [19] I agree with the case of *S.R. v. Aviva Insurance Canada*,<sup>16</sup> that it is not necessary for me to consider any evidence that does not pertain to whether or not the denial letter was clear and unequivocal and it is not necessary for me to consider circumstances outside the refusal.
- [20] In my view, the denial letter dated July 22, 2016 was clear and unequivocal, which complied with the *Schedule* and the requirements in *Smith*, as a result, the limitation period started on July 22, 2016. The Tribunal Application was filed in January 2019 and was therefore outside the two-year limitation period.

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<sup>12</sup> 2018 CanLII 73510 (ON LAT) ("S.S.")

<sup>13</sup> 2005 CanLII 47587 (ON CA) ("*State Farm v. Dominion*")

<sup>14</sup> *Supra* Note 7.

<sup>15</sup> Section 275(2) of the *Insurance Act*.

<sup>16</sup> 2018 CanLII 13157 (ON LAT) at para, 26.

[21] However, the applicant submits the Tribunal should invoke its discretionary power under s. 7 of the *Licence Appeal Tribunal Act*<sup>17</sup> (“LAT Act”) to extend the limitation period.

### **Jurisdiction to invoke section 7 of the LAT Act**

[22] The respondent submits that the Tribunal does not have jurisdiction to extend the limitation period under s. 7 of the *LAT Act* and relies upon the reconsideration decisions of *S.S. v. Certas Home and Auto Insurance Company*,<sup>18</sup> and *M.N. v. Aviva General Insurance Company*,<sup>19</sup> wherein Adjudicator Neilson determined in both cases that the Tribunal does not have jurisdiction to grant an extension under s. 7 of the *LAT Act*.

[23] In the alternative, the respondent submits that the applicant has not provided reasonable grounds of the four factors to extend the limitation period from the case of *A.F. v. North Blenheim Mutual Insurance Company*.<sup>20</sup>

[24] The applicant submits the Tribunal has jurisdiction to extend or vary the limitation period under s. 7 of the *LAT Act* and the *S.S. v. Certas* decision is an outlier and under appeal and should not be followed. The applicant submits that since June 1, 2016 the Tribunal has reported 62 decisions which refer to s. 7 and all except the *S.S. v. Certas* case found that s. 7 applied.<sup>21</sup> Furthermore, the applicant relies upon the Divisional Court case of *Manuel v Registrar, Motor Vehicle Dealers Act*,<sup>22</sup> which sets out the four-part test to determine whether the justice of the case requires that the extension be granted.

[25] The *S.S. v. Certas* decision has been appealed to the Divisional Court for an ultimate determination on whether or not the Tribunal has jurisdiction to extend the limitation period by virtue of s. 7 of the *LAT Act*. However, I agree with the majority of the Tribunal jurisprudence that s. 7 is within the Tribunal’s jurisdiction to extend the limitation period and I adopt it for the purposes of this hearing. In my view, the Tribunal has jurisdiction to grant an extension by virtue of s. 7 of the *LAT Act* if the justice of the case requires it should be extended.

[26] As a result, I will now turn to discuss whether or not the limitation period should be extended.

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<sup>17</sup> S.O. 1999, c. 12, Sched. G (“LAT Act”)

<sup>18</sup> 2016 CanLII 153125 (ON LAT) (“*S.S. v. Certas.*”)

<sup>19</sup> 2019 CanLII 119731 (ON LAT) (“*M.N.*”)

<sup>20</sup> 2017 CanLII 87546 (ON LAT) (“*North Blenheim*”)

<sup>21</sup> Written Submissions of the Applicant at Tab H. CanLII search results dated October 17, 2019.

<sup>22</sup> 2012 ONSC 1492 at para. 40. (“*Manuel*”)

## **Section 7 of the *LAT Act***

[27] The Tribunal has jurisdiction to extend the time for filing of an appeal pursuant to section 7 of the *LAT Act*, which reads:

Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- b) give the directions that it considers proper as a result of extending the time.

[28] In *Manuel*, the Divisional Court ruled that the overriding consideration on a request for an extension of time is whether the justice of the case requires that the extension be granted. The factors to be considered in making this determination are:

- a. The existence of a bona fide intention to appeal within the appeal period;
- b. The length of the delay;
- c. Prejudice to the other party; and
- d. The merits of the appeal.

[29] The appellant has the onus to establish that the justice of the case requires the granting of the extension, but he or she need not satisfy all four factors. Rather, the analysis requires a balancing of the conclusions reached when applying the facts of the case to the factors.

### ***Bona fide* intention to appeal and the length of the delay**

[30] The respondent's position is that the applicant did not have an intention to appeal within the two years as the denial date was July 22, 2016 and chose not to appeal it until January 10, 2019 despite being reminded by the respondent through correspondence on July 4, 2018 and October 10, 2018 that ACB's were terminated since July 22, 2016. However, the applicant failed to dispute the denial within the two-year limit. Furthermore, the respondent submits the

applicant disputed various medical benefits but not the ACB in a previous Tribunal application on July 19, 2018 and chose to wait to dispute the ACB until January 10, 2019.

- [31] The applicant submits that he had a *bona fide* belief that he was settling his claim for ACB's up to May 11, 2017 only and without prejudice to any future ACB claim and that he had an option to appeal a denial of ACB after May 11, 2017. It is the applicant's position that the respondent's denial on October 10, 2018 of his ACB claim represented a denial from which he could appeal.
- [32] In my view the Partial Release dated May 23, 2017 that the parties entered into is key to determining the applicant's *bona fide* intention. The Release document sets out that the applicant shall release the respondent from all claims, actions, cause of actions, litigation, mediations and demands whatsoever for past income replacement benefits, Attendant Care Benefits and Housekeeping Benefits *up to May 11, 2017* and all claims set out in the Application for Arbitration presently before FSCO. (emphasis mine).
- [33] The facts in the present case are similar to the facts in S.S.<sup>23</sup> where a settlement between the parties of an income replacement benefit for up to 104 weeks up to a certain date resolved the current arbitration proceedings. In S.S. it was held that there was no language in the Release to suggest that the applicant waived or that the release agreement foreclosed on any future claim for the post-104 week IRB benefit or any other benefit. As a result, it was found that the applicant had a *bona fide* belief induced by the language of the release agreement the applicant was only settling his IRB claim up to 104 weeks without any prejudice to any future claim. His option to appeal a denial of the post 104-week income replacement benefit remained opened and a subsequent denial letter represented a denial from which the applicant could appeal. The language of the release agreement was found to support the belief that it engendered and to be a reasonable explanation for the applicant in that case and a reason for not appealing the original denial.
- [34] In the present case, I find the facts similar to S.S. and the Release agreement clearly states the applicant's past claims of ACB up to May 11, 2017 are settled. It makes no mention of any future ACB claim or that any future ACB claim after May 11, 2017 was extinguished.

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<sup>23</sup> *Supra* Note 12.



[35] After a review of the evidence, I find that the first two factors are in support of the applicant.

### **Prejudice to the respondent**

[36] The respondent submits it is prejudiced because the initial denial was in July 2016 and no further assessment of the applicant with respect to the ACB was completed until October 2018.

[37] The applicant submits that he filed his Tribunal application within two weeks of the ACB denial in 2018 and the total delay, according to the timeline from the respondent if the July 22, 2016 denial is considered correct, is 24 weeks and 4 days and this has not prejudiced the respondent. According to the applicant, the respondent had an opportunity to request timely insurer examinations and review all relevant medical documents and that it obtained its own insurer examination on June 11, 2019.

[38] I agree with the applicant; I am not persuaded by the respondent's submission of any prejudice it may suffer as a result of extending the limitation period. The applicant submitted a new attendant care Form 1 in October 2018 and the respondent had an opportunity to conduct its own insurer examination thereafter. As a result, I find this factor to be in support of the applicant.

### **Merits of the appeal**

[39] This factor does not require me to make a determinative ruling on the merits, but on the facts to assess whether the applicant has a reasonable chance of success. The respondent submits the evidence is that since 2014 the applicant has ceased taking any medications, he has been able to and did independently attend university full-time and live on his own, he has resumed independence in his personal care tasks, including exercising without supervision or cueing, driving, and socializing with friends.

[40] The applicant does not provide specific submissions with respect to the merits of his appeal other than to state that he has been designated as catastrophically impaired and that he can submit a new Form 1 when his needs change.

[41] In my opinion, this written hearing was a preliminary issue hearing and not on the merits of the applicant's case. The fact that the applicant was receiving an ACB in the past and has been designated as catastrophically impaired, would support his position that there is a reasonable chance of success and that is all that is required with respect to this factor. A detailed analysis of proving entitlement to


the ACB is not necessary in deciding this factor. Even though a detailed review of the IE reports finds that the applicant is not entitled to the ACB, no one factor is determinative.

- [42] All four factors do not need to be satisfied; however, an analysis and balancing all the factors as discussed above is required. After a consideration of the four factors, I find that the applicant had a reasonable explanation for the delay and for not appealing the July 22, 2016 denial because of the Release agreement which only extinguished the applicant past claims for ACB up to May 11, 2017. I find there to be minimal, if any, prejudice to the respondent and there may be some merit in the applicant's ACB claim. After considering all four factors together, I conclude that the justice of the case warrants extending the limitation period for the ACB.

### **ORDER**

- [43] The application for the ACB is entitled to be appealed as a result of invoking s. 7 of the *LAT* Act and either party may contact the Tribunal to schedule a case conference to determine the next steps in this matter.

**Released: July 14, 2020**



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**Sandeep Johal**  
**Adjudicator**