

Safety, Licensing Appeals and
Standards Tribunal Ontario
Licence Appeal Tribunal

**Automobile Accident Benefits
Service**

Mailing Address: 77 Wellesley St.
W., Box 250, Toronto, ON M7A 1N3

Tel: 416-314-4260
1 800-255-2214
TTY: 416-916-0548
1 844-403-5906
FAX: 416-325-1060
1 844-618-2566

Website:

www.slsto.gov.on.ca/en/AABS

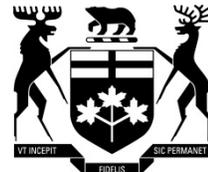
Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario
Tribunal d'appel en matière de permis

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d'accident automobile**

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:
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Ontario

AMENDED RECONSIDERATION DECISION

Before: D. Gregory Flude, Vice-Chair

Date: February 11, 2020

File: 17-002122/AABS

Case Name: M. T. G. v. Aviva General Insurance

Written Submissions by:

For the Applicant: Jillian Van Allen, Counsel
Lora Castellucci, **Counsel**

For the Respondent: Mai T. Nguyen, Counsel
Sabina Arulampalam, **Counsel**

OVERVIEW

- [1] On July 16, 2019, I released my reconsideration decision in this matter setting aside the decision of the adjudicator released on March 9, 2018. I granted the request for reconsideration on the basis that the adjudicator made an error of fact or law in reaching the conclusion that M.T.G. was able to proceed with his claim as he had applied to the Tribunal within the limitation period.
- [2] In his responding reconsideration submissions, M.T.G. raised the provisions of section 7 of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c 12, Sched G (LAT Act). That section gives me the discretion to extend the 2-year limitation period set out in section 281.1 of the *Insurance Act*, R.S.O. 1990 c I.8 and section 56 of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10.
- [3] Given that M.T.G. raised the issue for the first time in his responding reconsideration submissions, I gave Aviva the opportunity to make reply submissions on the application of section 7 of the LAT Act.
- [4] This decision addresses the parties' submissions on the issue of the application of section 7 of the LAT Act. I am not satisfied that there are reasonable grounds to grant the applicant the requested relief to extend the limitation period to allow his late appeal. M.T.G.'s claim for an income replacement benefit is dismissed as being out of time.

ANALYSIS

- [5] In this proceeding for the extension of the limitation period, M.T.G. carries the burden of establishing that the justice of the case favours granting the extension. Having considered the submissions of the parties, I find that he has failed to satisfy that onus.
- [6] Both parties point me to the reconsideration decision in *A.F. v North Blenheim Insurance*, 2017 CanLII 87546 (ON LAT) (*North Blenheim*) as a guide to the factors I must weigh in the exercise of my discretion. That decision sets out the four-part test delineated by the Divisional Court in *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002*, 2012 ONSC 1492 (CanLII) (*Manuel*), a case in which this Tribunal denied an extension to Mr. Manuel after he was approximately three days late filing his Notice of Appeal. Notwithstanding the four-part test, the overriding factor for my consideration is the justice of the case.
- [7] The four factors set out in *Manuel* and applied in *North Blenheim* 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.

[8] M.T.G. addresses the test in his submissions as follows:

- a. *The Existence of a Bona Fide Intention to Appeal within the Appeal Period:* The Applicant demonstrated a bona fide intention to proceed with a dispute over the termination of his income replacement benefits by applying for a FSCO mediation, requesting a failed FSCO Report of Mediator, and thereafter commencing the LAT Application.
- b. *The Length of the Delay:* The length of delay from March 23, 2017 (two years after the date on which Aviva submits the Applicant's lawyer ought to have discovered the denial letter on March 23, 2015) to March 31, 2017 (the date the LAT Application was submitted) is a period of one week.
- c. *Prejudice:* The prejudice that is relevant to consider is the prejudice that is caused, perpetuated, or exacerbated by the delay. Here, the delay is one week. There is no possible way that Aviva could be prejudiced by a one-week delay.
- d. *The Merits of the Appeal:* The applicant is requesting a one-week extension, there is no prejudice to Aviva. The applicant demonstrated a bona fide intention to dispute the termination of the IRB, but the deadline was missed by inadvertence.

Chronology

[9] My decision in this matter, released on July 16, 2019, sets out the chronology of events more fully than is necessary for the current analysis. For the purposes of this analysis, I will focus on the events from May 16, 2016 when FSCO scheduled a mediation to March 31, 2017 when the applicant filed his application with this Tribunal.

[10] The key events are as follows:

1. M.T.G. received the letter denying him income replacement benefits on or about February 15, 2015. He is deemed to have received it five days after Aviva sent it on February 10, 2015.
2. May 18, 2016 – FSCO scheduled a mediation for May 28, 2016.
3. May 26, 2016 – The applicant's counsel submitted a Request for a Failed Mediation Report to FSCO.

4. May 28, 2016 – FSCO sent a form letter to the parties indicating that it was closing its file. While the letter cites four possible reasons for the action, no specific reason is identified.
5. February 15, 2017 – the two-year limitation period expires.
6. March 31, 2017 – The applicant filed his application with this Tribunal.

No clear intention to appeal within the appeal period

- [11] I find there is little indication in the record of a clear intention by the applicant to appeal within the appeal period. In arriving at this conclusion, I consider that the period during which I must look for that intention is not the whole of the two-year period from February 2015 when the applicant got notice of the denial to February 2017 when the limitation period expired, but is the period between the failed mediation in May 2016 and the expiry of the limitation period on February 15, 2017.
- [12] Prior to April 1, 2016, there was no right of appeal to the Tribunal. The pre-April 2016 procedure required mandatory mediation followed by one of three elections: to proceed to arbitration at FSCO, to commence a law suit, or to do nothing. After April 2016, the court option was removed so M.T.G.'s options were to do nothing or apply for dispute resolution before this Tribunal. During the appeal period, up to February 2017, he did nothing. There is no explanation for this inaction.
- [13] On February 6, 2017, counsel for M.T.G. contacted counsel for Aviva to arrange settlement discussions. By then, M.T.G. had been undeniably aware of the February 10, 2015 denial letter for approximately 18 months. In the affidavit evidence at the initial hearing, counsel for M.T.G. admitted that the letter had been faxed to him on October 22, 2015. The settlement discussion on February 22, 2017 addressed the timeliness of the income replacement benefit appeal. In addition to the February 15, 2017 letter, Applicant's counsel had, in fact, received it on March 23, 2015 on the CD he had not reviewed.
- [14] By February 22, 2017, M.T.G. had had full knowledge of the facts for a minimum of 18 months and was aware of Aviva's position on the timeliness of an application for dispute resolution. Even though that date was past the limitation period which expired on February 15, 2017, had he moved expeditiously for the relief he now seeks in February 2017, there might have been more weight to his submission that he had a clear intention to appeal within the appeal period. The adjuster's log notes, however, indicate that he had not yet formed an intention to appeal. M.T.G.'s counsel advised that he would speak to his client and call back. That that conversation resulted in instructions to commence an appeal for an

income replacement benefit after the two-year limitation period is evidenced by the fact that M.T.G. commenced his appeal on March 31, 2017.

Length of the Delay

- [15] The facts set out in the analysis of the intention to appeal are also relevant with respect to the length of the delay. The delay is 6 weeks after the expiry of the limitation period. As set out above, the delay is unexplained. In the Divisional Court decision in *Manuel v. Registrar*, 2012 ONSC 1492 (CanLII), the delay was a matter of three days. The court recognized that the length of the delay is only one factor but that limitation periods are not to be set aside lightly. At paragraph [27] the court addressed the question of delay as follows:

In effect, the Appellant submits that this factor alone should have been sufficient to require the LAT to grant the extension of time. We do not agree. All four aspects of the test are to be considered and no one element necessarily is determinative. Moreover, the logical consequence of this submission would be that a relatively short delay would always result in an extension, undermining the very purpose of appeal periods.

- [16] By enacting the two-year limitation period in the Act and Schedule, the Legislature has established a policy that disputes between insurers and insureds should be dealt with expeditiously. While the Legislature has granted this Tribunal the discretion to extend limitation periods, the circumstances in which the Tribunal will exercise its discretion should be limited. Section 7 of the LAT Act is not a safety net for litigants who sleep on their rights or who do not move expeditiously to advance their claims. This is especially true in the current case where M.T.G. was ready to proceed with his case before FSCO in May 2016 and, despite not reading the disclosure on the CD sent by Aviva on March 23, 2016, had the date of denial specifically drawn to his attention in October 2016 when Aviva faxed the denial letter to him.

Prejudice

- [17] M.T.G. takes the position that prejudice to Aviva must be prejudice that occurred following the expiry of the limitation period. In his view, Aviva suffers no prejudice from his request for a one-week extension of the limitation period from March 23, 2017 to March 31, 2017. I have found that it is, in fact, seven weeks. While it is true that Aviva had to stand ready to defend a claim for an income replacement benefit until February 15, 2017, the real prejudice to Aviva is the denial of its ability to regulate its affairs on the basis of legislative requirements. That analysis invokes the whole of the two-year limitation period. In fact, the logic of the M.T.G.'s position leads to result the court in *Manuel* found unconvincing when

dealing with short delays. On the applicant's reasoning, an insurer can never show prejudice arising out of a "short" extension of the limitation period.

Merits of the Appeal

[18] M.T.G. has misunderstood this test in his submissions. The purpose of the merits test is to filter out case which, on their facts, have little or no chance of success. The test is not a hard one. It requires M.T.G. to lead evidence on a motion to extend time that, if accepted, would support a finding in his favour of entitlement to an income replacement benefit. He has not drawn my attention to any such evidence in his submissions.

[19] In an attempt to address the lack of evidence in this area, I have reviewed the submissions made at first instance. The only evidence is at paragraph 3 of his affidavit in support of the preliminary issue motion sworn on August 23, 2017. M.T.G. states the following:

As a result of the accident and injuries I sustained, I have been unable to work. I made two brief but unsuccessful attempts to return in 2015 and 2016 but could not keep either job due to my limitations. I presently subsist on social assistance.

[20] Thus, there is little before for me justifying the merits of M.T.G.'s appeal.

Weighing the Factors

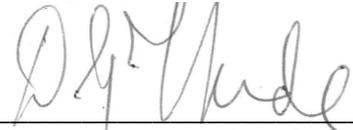
[21] While the case law sets out a four-part test for factors to be considered, it is clear that they are guides to seeking the underlying justice of the case. No one factor is determinative and weakness in one area may be counterbalanced by strength in another area. M.T.G. has the onus of establishing that I should exercise my discretion in his favour.

[22] Considering the justice of the case, in light of clearly stated policy that disputes such as these should be resolved expeditiously, I do not discern anything in the facts that suggests that I should exercise my discretion under section 7 of the LAT Act to extend the limitation period in order to ensure that justice is served. The only explanation the applicant has is inadvertence. While the application is not frivolous in that it deals with a right to income while recovering from injuries, the evidence of the merits of the case, as laid before the Tribunal in the preliminary issue motion, is skeletal. Finally, M.T.G. led no evidence negating the prejudice suffered by Aviva in not being able to rely on the limitation period in the conduct of its affairs. I am not satisfied that there are reasonable grounds to grant the applicant the requested relief under section 7 of the LAT Act to extend the limitation period to allow his late appeal.

DECISION

[23] Having considered the submissions of the parties, I find that this is not a case to extend the time for filing the appeal under section 7 of *the Licence Appeal Tribunal Act, 1999*. M.T.G.'s claim for an income replacement benefit is dismissed as being out of time.

Released: February 11, 2020



Greg Flude, Vice Chair