Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A14-008047

BETWEEN:

GARETH MAYO

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Marshall Schnapp

Heard: By written submissions due September 9, 2016

Appearances: Mr. Robert Littlejohn for Mr. Gareth Mayo
Ms. Lisa Armstrong for Economical Mutual Insurance Company

Issues:

The Applicant, Mr. Gareth Mayo, was injured in a motor vehicle accident on May 2, 2005 and sought accident benefits from Economical Mutual Insurance Company ("Economical"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through Mediation, and Mr. Mayo applied for Arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

A Pre-Hearing took place before Arbitrator Matheson on June 16, 2016. At that time, the parties agreed to have this Preliminary Issue Hearing in writing.

[1] *The Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The issue in this Preliminary Issue Hearing is:

1. Has Mr. Mayo missed the two-year limitation period to dispute Economical's refusal to pay attendant care benefits and housekeeping benefits, as set out in the *Schedule*, such that he is precluded from proceeding to an Arbitration regarding his entitlement to these benefits?

Result:

1. Mr. Mayo missed the two-year limitation period to dispute Economical's refusal to pay attendant care benefits and housekeeping benefits, as set out in the *Schedule*, such that he is precluded from proceeding to an Arbitration regarding his entitlement to these benefits.

EVIDENCE AND ANALYSIS:

Background

Mr. Mayo was in a motor vehicle accident on May 2, 2005 and as a result of the accident, his left leg collided with a commercial sign and was severed under the knee. He was taken to Orillia Soldiers' Memorial Hospital, where he was diagnosed with a traumatic below-knee left leg amputation with comminuted fracture in the proximal tibia. On May 2, 2005, Mr. Mayo underwent a left below-knee amputation and debridement of the compound proximal tibula/fibula fracture. He was discharged from Orillia Soldiers' Memorial Hospital on May 11, 2005.

According to the Form 1s (Assessment of Attendant Care Needs) submitted by the Insurer as evidence, Mr. Mayo began receiving attendant care benefits as of May 17, 2005. The Insurer's section 44 Occupational Therapist, Ms. Lisa Knudstrup, assessed Mr. Mayo the day he was discharged home from the Hospital. Ms. Knudstrup prepared and submitted a Form 1, dated May 17, 2005, recommending $2,930.23 of monthly attendant care assistance. Ms. Knudstrup met with Mr. Mayo and his wife on a monthly basis for the first seven months following the accident. Ms.

Knudstrup subsequently met with the Applicant and his wife on a bi-monthly basis for another six months. Overall, Ms. Knudstrup assessed the Applicant on twelve occasions and submitted 12 further Form 1s, recommending attendant care benefits for the first month in the amount of $2,930.23 and decreasing over two years with the last Form 1, dated January 24, 2007, recommending $260.62 of monthly attendant care. In total, Mr. Mayo received $10,412.52 in attendant care benefits up to the 104-week mark.

Economical paid the Applicant both attendant care benefits and housekeeping and home maintenance benefits ("housekeeping benefits") up to the 104 week mark. Economical then sent Mr. Mayo an Explanation of Benefits Form ("OCF-9"), dated March 30, 2007, stating that no further benefits would be paid after the 104 week mark. The OCF-9 also contained language regarding the dispute resolution process and a warning of the two-year limitation period to dispute the Insurer's refusal to pay further benefits. At this time Mr. Mayo was represented by counsel.

Mr. Mayo did not dispute Economical's refusal to pay further attendant care benefits and housekeeping benefits until more than eight years following Economical's refusal to pay the benefits.

Mr. Mayo obtained new legal counsel in 2013. His new counsel, Mr. Robert Littlejohn, sent correspondence, dated April 4, 2013, to a Ms. Down, a claims adjuster. In that letter, Mr. Littlejohn wrote in part the following: "Further to our two conversations earlier today, I confirm you have now had a chance to review this file and are not aware of there being any denials of any kind."[2]

Ms. Down wrote to Mr. Littlejohn following their discussion, indicating "We do not have a denial in anything in 2011…".[3]

The Applicant later submitted an Application for Determination of Catastrophic Impairment

[2] Letter from Littlejohn Barrister to Economical, April 4, 2013, Applicant's Record, Tab 3.
[3] Letter from Economical, including fax transmission confirmation, April 4, 2013, Addendum Record of Insurer, Tab 2.

(OCF-19), dated June 9, 2014.[4]

The attendant care benefits issue became the subject of a failed Mediation on June 8, 2016.[5]
In support of the claim for attendant care benefits, Mr. Mayo retained an assessor, Ms. Tanya Purevich (Occupational Therapist) at Rehab First Inc., to complete Assessment of Attendant Care Needs Reports. Ms. Purevich submitted seven Form 1s which were all dated April 9, 2015.[6]
Despite the common date, the seven Form 1s recommended the provision of monthly attendant care from May 2, 2005 to the present and ongoing.

On June 20, 2016, the Insurer accepted that Mr. Mayo had suffered a catastrophic impairment as a result of the accident.[7]

Economical's Position

Economical submits it sent Mr. Mayo, who was represented by different legal counsel at that time, an OCF-9 Form, dated March 30, 2007, containing a valid refusal to pay further attendant care and housekeeping benefits. The OCF-9 also contained language regarding the dispute resolution process and a warning of the two-year limitation period to dispute the Insurer's refusal to pay further benefits.

The Insurer's position is that the Applicant is statutorily barred from proceeding to an Arbitration regarding his entitlement to attendant care benefits and housekeeping benefits as he failed to commence the dispute resolution process within the two-year limitation period established by the *Schedule* and the *Insurance Act*. The Applicant did not mediate these benefits before March 30, 2009, and did not even dispute the termination of these benefits until May 28, 2015, more than eight years following the Insurer's refusal to pay the benefit.

[4] Insurer's Brief, Tab 18.
[5] Insurer's Brief, Tab 13.
[6] Multiple Form 1s, Ms. Tanya Purevich (Occupational Therapist), Rehab First Inc., April, 9, 2015, Insurer's Brief, Tab 15.
[7] Letter from Economical to Mr. Gareth Mayo, June 20, 2016, Insurer's Brief, Tab 23.

Economical submits that Courts and Arbitrators have upheld the importance of limitation periods in achieving a balance between an individual's right to justice on one hand and the systemic need for finality on the other.[8]

Economical opines Courts have considered the meaning of "clear and unequivocal", and found that such a refusal must be provided in writing and must provide a reason for the refusal to pay the benefit.[9]

Economical notes that there are numerous reasons why an Insurer may refuse to pay a benefit. It is illogical to suggest that an Insurer can only refuse to pay a benefit after determining that an Insured no longer meets the legislated disability test to receive a benefit, or after determining that an Insured no longer requires a benefit based on their function or ability.

According to Economical, Courts and Arbitrators have also held that if the Insurer's refusal to pay a benefit is clear and unequivocal, an Insurer asking for further information subsequently or discussing settlement of the denied benefit will not restart the limitation period, and prior and subsequent events will not extend a limitation period.[10]

Economical submits that Mr. Mayo had the required information to decide whether to dispute or accept the Insurer's refusal to pay further attendant care benefits or housekeeping benefits.

Economical highlights the fact that the Assessment of Attendant Care Needs Report, dated May 1, 2015, recommended that Mr. Mayo required a monthly attendant care benefit in the immediate

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[8] *M.(K.) v. M.(H.)*, 1992 Carswell Ont 841 (S.C.C.) (W.L.), at paras. 22-24, Insurer Book of Authorities, Tab C; *Haldenby v. Dominion of Canada General Insurance Company*, (2001) O.J. No. 3317, at para. 17, Insurer Book of Authorities, Tab D and *Nicholas v. McCarthy Tetrault*, 2008 Carswell Ont 6320 (S.C.J.) (W.L.), at paras. 26 and 27, affirmed 2009 ONCA 692 (Ont C.A.), Insurer Book of Authorities, Tab E.

[9] *Zeppieri and Royal Insurance Company of Canada* (QIC A-005237, February 17, 1994), Insurer Book of Authorities, Tab L; *Turner v. State Farm Mutual Automobile Insurance Company*, (2005) 195 OAC 61 (ONCA), Insurer Book of Authorities, Tab M and *Monks and Dominion of Canada General Insurance Company* (FSCO P09-00018, December 10, 2009), Insurer Book of Authorities, Tab N.

[10] *Shen and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, 2010 Carswell Ont 820, at para. 17, Insurer Book of Authorities, Tab H and *Mohammed-Amin and RBC General Insurance Company* (FSCO A06 B 002188, June 25, 2007), Insurer Book of Authorities, Tab K.

post-104 week period.[11] Thus this is not a case where Mr. Mayo is alleging that his functional abilities deteriorated in the months and/or years following the two-year limitation period, resulting in him being unable to perform some of his personal care activities independently. This is a case where Mr. Mayo did not dispute Economical's denial within the statutory two years, and Mr. Mayo waited over eight years to do so, despite being represented by counsel.

Economical submits that while sections 18(3) and 22(4) of the *Schedule* set out that an insured person who has suffered a catastrophic impairment as a result of an accident is not subject to the 104-week limit for payment of incurred housekeeping benefits and attendant care benefits, these provisions do not release Mr. Mayo's obligation to adhere to the two-year limitation period established by the *Schedule* and the *Insurance Act*, following a valid refusal of benefits. Similarly, it is also Economical's position that these provisions of the *Schedule* do not suggest that the possibility or actuality of being found to have suffered a catastrophic impairment release Mr. Mayo from his obligation to adhere to the two-year limitation period following Economical's refusal to pay a benefit.

Economical relied on the decision of *Somerville and State Farm*, where the Insured was paid housekeeping benefits for a time following his accident on June 8, 2005. State Farm issued a refusal to pay further housekeeping benefits on November 23, 2005. About five years after the accident, the Insured was determined to have sustained a catastrophic impairment as a result of the accident, and after the determination, the Insured applied for Mediation of the housekeeping benefit issue. The Insured's argument was that State Farm could not rely on a denial that failed to advise that a failure to dispute would affect his future right should deterioration occur and/or he become catastrophically impaired.

Arbitrator Rogers rejected this argument:

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[11] Insurer's Brief, Tab 14.

> The consumer protection objective does not create rights not found in the *Schedule*. Mr. Somerville identified no provision in the *Schedule* potentially imposing the obligation for which he argues. I find none.
>
> ... There is no provision that allows him to make a further application for housekeeping and home maintenance benefits after termination. Post-104 housekeeping is not a different benefit, as Mr. Somerville argued. Had he qualified, State Farm would have been required to continue to pay the same benefit.
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> ... Since Mr. Somerville did not apply for mediation within two years of State Farm's denial of housekeeping and home maintenance benefits, he is precluded from arbitrating this issue.[12]

Economical also notes that in coming to his decision, Arbitrator Rogers quoted the Court of Appeal's decision in *Haldenby v. Dominion*, which found that "there is no provision in... the SABS which allows a claimant to reapply for further benefits after an insured person's benefits have been terminated by the Insurer. The only remedy for the insured person is to appeal the termination of benefits within the two-year period."[13] Economical also relies on the reasoning in *Haldenby*, where the Court of Appeal also held that allowing an Insured to reapply for further benefits once the benefits have been terminated by the Insurer "would extend an insured's entitlement to benefits for an indeterminate period of time and is inconsistent with the Supreme Court of Canada's rationale which underlined the common sense of, and the need for limitations periods [being] the systemic need for finality, certainty and the principle of diligence."[14]

Another case relied on by Economical is *Ramalingam and State Farm*,[15] where the claimant also

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[12] *Somerville and State Farm Mutual Automobile Insurance Company* (FSCO A12-006767, September 11, 2014), at p. 6, Insurer Book of Authorities.

[13] *Haldenby v. Dominion of Canada General Insurance Company*, (2001) O.J. No. 3317, 55 O.R. (3d) 470, at paras. 30 and 31, Insurer Book of Authorities, Tab D.

[14] *Ibid.*, at paras. 35 and 36.

[15] *Ramalingam and State Farm Mutual Automobile Insurance Company* (FSCO A08-001571, June 4, 2010), Insurer Book of Authorities, Tab R.

tried to argue that pre-104 week and post-104 week housekeeping benefit claims could be broken into two separate and distinct issues. Arbitrator Lee disagreed and noted that the Insured was unable to provide authority in the *Schedule* which supported this proposal. Arbitrator Lee also found that no jurisprudence or authority in the *Schedule* suggested that an Insurer may be required to issue two denials for every housekeeping claim - one for the pre-104 week benefit period and another for the post-104 week benefit period.

It is also Economical's position that a decision which supports that the benefits are separate and distinct in order to allow the Applicant to escape the established two-year limitation period would set a significant and dangerous precedent. Such a finding would make the Insurer's refusal to pay further benefits beyond the 104-week mark moot since that denial would only apply for pre-104 week benefits which, in matters such as this present dispute, were already paid when the Insurer issued its refusal to pay further benefits beyond the 104-week mark.

Economical also relies on the Court of Appeal's ruling in *Haldenby*. The Court held that there is no provision in the *Schedule* which allows a claimant to reapply for further benefits after an insured person's benefits have been terminated by the Insurer, and the only remedy for the insured person is to appeal the termination of benefits within the two-year period.[16]

Furthermore, the proposition that an Insured's entitlement to post-104 week benefits commences retroactively once the Insured is determined to have suffered a catastrophic impairment places uncertainty and prejudice on the Insurer, and results in an unfair and illogical outcome. The illogical outcome would result from the fact that, as in this case, after refusing to pay further attendant care benefits and housekeeping benefits after the 104-week mark, this Insurer would have been required to continue assessing Mr. Mayo's entitlement to receive housekeeping benefits and attendant care benefits due to the potential that Mr. Mayo may, one day, in his lifetime, submit an Application for Catastrophic Impairment Designation.

[16] *Supra*, note 12, at paras. 30 and 31.

Economical also relies on the *Somerville* decision for the proposition that the consumer protection objective of the *Schedule* does not create rights not found in the *Schedule*.[17]

Economical acknowledges that Arbitrators have awarded retroactive housekeeping and attendant care benefits from the post-104 week mark onwards once the Arbitrator has determined that the claimant suffered a catastrophic impairment. However, in the majority of those cases, the Insurer had not issued a written notice letter or OCF-9 refusing to pay further benefits beyond the 104-week mark, and thus a limitation defence was not raised. Therefore those decisions are not applicable to the present dispute.

According to Economical, recent jurisprudence on limitation periods and catastrophic impairment claims are not relevant to the issue before me. The decision in *Guarantee v. Do*[18] established that an Insurer's denial of a catastrophic impairment claim "does not in itself amount to a denial of a benefit and that it is only where a specific benefit is denied that the limitation period commences to run against the claimant." Economical submits that while a catastrophic impairment determination affects a claimant's entitlement to a greater level of benefits, it does not dispose of the limitation period set out by the *Schedule* and the *Insurance Act*.

Economical also relies on the jurisprudence that has upheld that an Insurer may refuse to pay a benefit claimed for any reason, even one that is incorrect, and such a refusal will trigger the running of the two-year limitation period as long as the refusal to pay a benefit is clear and unequivocal and includes information regarding the *Schedule's* dispute resolution process.[19]
It is also noted that Mr. Mayo has not provided any jurisprudence or FSCO decisions which held that an Insurer's refusal is invalid if it does not contain the words "refused" or "denied" or "stopped".

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[17] *Supra,* note 11, at p. 6.

[18] *The Guarantee Company v. Dong Do et al*, 2015 ONSC 1891 (Can LII), Insurer Book of Authorities, Tab U.

[19] *Smith v. Co-operators General Insurance Co*mpany, [2002] 2 S.C.R. 129, at para. 14, Insurer Book of Authorities, Tab G; *Turner v. State Farm Mutual Automobile Insurance Company*, (2005) 195 OAC 61 (ONCA), Insurer Book of Authorities, Tab M and *Punwasie and State Farm Mutual Automobile Insurance Company* (FSCO AO8-001332, April 14, 2009), Insurer Book of Authorities, Tab O.

Economical submits that Mr. Mayo's arguments regarding waiver and estoppel hold no merit. Economical is of the view that Ms. Down wrote to Mr. Littlejohn following their discussion, indicating that it was her understanding that Mr. Littlejohn was only asking about denials made in 2011, and confirming that she had indicated nothing had been denied in 2011.[20] With respect to Mr. Mayo's submission that Economical's letter, dated December 16, 2014, denying his catastrophic impairment status, which concluded "therefore no entitlement to increased medical/rehabilitation or attendant care benefits exists", it is Economical's position that this was not a new denial of attendant care benefits but simply a reiteration of the previous denial. In any event, Economical relies on the case law that where an Insurer's refusal to pay a benefit is clear and unequivocal, prior and subsequent events do not extend the time limits for disputing the Insurer's refusal.[21]

Mr. Mayo's Position

Mr. Mayo received attendant care and housekeeping benefits up to May 2, 2007, the 104-week mark after his accident. It is Mr. Mayo's position that beyond May 2, 2007, he was not entitled to receive either of these benefits until he was deemed to be catastrophically impaired. And these benefits were never denied because of a failure to satisfy the relevant tests for entitlement. Mr. Mayo's submission is that the OCF-9 and related correspondence do not constitute a valid denial of his post-104 week attendant care and housekeeping benefits.

Mr. Mayo notes that the section 44 Occupational Therapist, Ms. Lisa Knudstrup, who assessed him on January 23, 2007 with respect to his attendant care and housekeeping needs, found that he did require ongoing attendant care and housekeeping services.[22] She also believed his needs should be re-assessed at the 104-week mark, May 2, 2007, as it appeared that he may have reached a plateau in his recovery given that his attendant care needs had not changed in

[20] *Supra*, note 3.

[21] *Shen and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, 2010, Carswell Ont 820, at para. 17, Insurer's Book of Authorities, Tab H.

[22] Occupational Therapy Progress Report #11 of Ms. Lisa Knudstrup, January 24, 2007, Applicant's Record, Tab 1.

approximately 9 months.[23] As well in the same report, Ms. Knudstrup concluded that Mr. Mayo continued to suffer a substantial inability to perform his housekeeping.[24]

Thus, according to Mr. Mayo, at no point was his entitlement to attendant care and housekeeping benefits denied because he did not require them. Ms. Knudstrup's opinion was that that he continued to require these benefits and would continue into the future given that his recovery had plateaued.

On March 30, 2007, Mr. Mayo received correspondence and an OCF-9 from Economical with respect to his attendant care and housekeeping benefits. The OCF-9 stated the following:

> HH: As per s. 22 of the SABS, housekeeping/home maintenance expenses are not payable past 104 weeks after the onset of disability (which is May 2007).
> AC: As per s.18 of the SABS, attendant care benefits are not payable past 104 weeks after your motor vehicle accident. Enclosed is your final attendant care benefit payment: April 1 - May 2007.[25]

Mr. Mayo submits there are three deficiencies with the OCF-9 or the related correspondence. The first is nowhere on this OCF-9 or the related correspondence does it state that Mr. Mayo's entitlement to attendant care or housekeeping benefits is $0.00. Second, they do not state that these benefits had been "refused", "denied", or "stopped". And third, the documents did not inform Mr. Mayo that he would be entitled to attendant care and housekeeping benefits beyond the 104-week point if he was deemed catastrophically impaired. The OCF-9 and related correspondence make no mention of catastrophic impairment.

According to Mr. Mayo, it was never open to Economical to deny these benefits before he had been deemed catastrophically impaired, which is a threshold requirement that must be met before

[23] *Ibid.*, at p. 6.
[24] *Ibid.*, at p. 7.
[25] OCF-9 and Related Correspondence, March 30, 2007, Applicant's Record, Tab 2.

an Insured is even entitled to post-104 week attendant care and housekeeping benefits. There can be no denial prior to entitlement.

Mr. Mayo notes that the Court of Appeal recently considered an issue similar to the issue before me in *Machaj v. RBC General*.[26] The alleged denial in that case involved an OCF-9 that stated the following: "Please note that the assessors have formed the consensus opinion that you have not sustained a Catastrophic Impairment and therefore you do not qualify for the increased benefits." Mr. Mayo submits that the reasoning by the Court in this decision supports his submission that an Insurer cannot deny the benefits for which catastrophic impairment is a prerequisite without an acknowledged entitlement to them via a catastrophic designation. There can be no denial prior to entitlement.

Mr. Mayo opines the OCF-9 and related correspondence did nothing more than tell him that he lacked the status to claim attendant care and housekeeping benefits beyond the 104-week mark. The reference to the specific benefits does not convert what is, in substance, a denial of a catastrophic determination into a denial of the specific benefits so as to trigger the commencement of the limitation period.

Mr. Mayo submits an Insurer cannot deny that an Insured is catastrophically impaired until the Insured has applied to be deemed catastrophically impaired.[27] Mr. Mayo believes that it follows from this holding that an Insurer cannot deny benefits for which catastrophic impairment is a pre-requisite unless and until catastrophic impairment has been accepted and these benefits have been applied for by the Insured. Mr. Mayo's position is that it would be inconsistent with the purpose of the *Schedule* to permit Insurers to deny entitlement to benefits for which being deemed catastrophically impaired is a pre-requisite without the Insured first being deemed catastrophically impaired. It would be unjust and run counter to the aim of consumer protection.

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[26] *Machaj v. RBC General Insurance Co.*, 2016 ONCA 257, at para. 4, Applicant's Book of Authorities, Tab 8.

[27] *Ramalingam and State Farm Mutual Automobile Insurance Company*, 2010 Carswell ON, 4547, Applicant's Book of Authorities, Tab 10.

By upholding the "denial" in this case, it would effectively result in Insurers being able to unilaterally create a time limit when it comes to an Insured applying for determination of whether an impairment is a catastrophic impairment. This could not have been what the Legislature intended when it drafted the *Schedule*. As the *Schedule* contains no limitation period when it comes to applying for a catastrophic designation, if an Insured is deemed catastrophically impaired at any time, they should be able to gain access to the enhanced benefits that this designation entails.

It is submitted that to uphold the limitation period in this case before me would permit Insurers to effectively create a limitation period when it comes to applying for a catastrophic designation which would be greatly prejudicial for a number of Insureds. In particular, it would be prejudicial for Insureds who sustain a deteriorating impairment that may not be significant enough to be deemed catastrophic for four or more years post-accident.

While the facts before me do not involve an Insured whose condition deteriorated, Mr. Mayo relies on the decision of *Smith v. Co-operators*, which found there was an obligation to "impose bright-line boundaries between the permissible and the impermissible without undue solicitude for particular circumstances that might operate against claimants in certain cases."[28]

Mr. Mayo also notes that the decisions of *Somerville*, *Aloysius and Royal*, *Haldenby* and *Sietzema v. Economical*, which Economical is relying on, are not relevant to the case before me, as the benefits at issue were terminated prior to the 104-week mark, and rather because the Insurer found that the Insured no longer met the disability tests to receive the benefits in question. With respect to the *Ramalingam* decision, Mr. Mayo highlights that Arbitrator Lee decided the issue of whether the Applicant was barred from proceeding with his claim for housekeeping benefits on the basis of *res judicata*, and Arbitrator Lee held that it was not necessary to decide the issue of whether the Applicant's claim for housekeeping benefits was barred because of the expiration of the limitation period.

[28] *Smith v. Co-operators General Insurance Company*, 2002 SCC 30, at para. 16, Applicant's Book of Authorities, Tab 1.

The reasoning by Director's Delegate Blackman in *Augello and Economical* is also relied upon by Mr. Mayo. In that case it was considered whether physical and psychological impairments were to be combined in calculating an Insured's whole person impairment. In holding that physical and psychological impairments could be combined, Director's Delegate Blackman held as follows: "I am not persuaded that the consequence of denying the Respondent this enhanced level of coverage promotes the legislative purpose of ensuring that victims of motor vehicle accidents at a higher tier of accident-related impairment have access to an expanded scope of statutory benefits."[29] Mr. Mayo submits that the same reasoning applies to the issue to be determined in this case, and by finding that it is proper to deny post-104 week attendant care and housekeeping benefits at or before the 104-week point, simply because the Insured has yet to be deemed catastrophically impaired, would not promote "the legislative purpose of ensuring that victims of motor vehicle accidents at a higher tier of accident-related impairment have access to an expanded scope of statutory benefits."

Mr. Mayo also submits that Economical did not provide a clear and unequivocal denial of the benefits at issue. In order to be a valid denial, a denial must be "*clear and unequivocal*".[30] While Economical's correspondence, dated March 30, 2007, does state Mr. Mayo's "*final attendant care benefit*" was enclosed, Arbitrator Miller held in *Howard and State Farm*[31] that this language is insufficient to represent a "*clear and unequivocal*" denial. With respect to the remainder of the language contained in the OCF-9 and related correspondence, Mr. Mayo relies upon the decision of Arbitrator Ashby in *Monks and Dominion*.[32] It was held that the statements were "misleading because it fails to refer to subsection 18(3) of the *Schedule* which excludes those insured persons who suffer a catastrophic impairment from the provisions limiting the benefit to 104 weeks."

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[29] *Augello and Economic Mutual Insurance Company*, 2009 Carswell Ont., 7570, at para. 97, Applicant's Book of Authorities, Tab 16.

[30] *Guarantee Company of North America v. Do*, 2015 ONSC 1891 (Div. Ct), Applicant's Book of Authorities, Tab 7.

[31] *Howard and State Farm Mutual Automobile Insurance Company*, 2002 Carswell Ont 5273, at paras. 30-32, Applicant's Book of Authorities, Tab 17.

[32] *Monks and Dominion of Canada General Insurance Company*, 2009 Carswell Ont 2932, at para. 7, Applicant's Book of Authorities, Tab 18.

The "misleading" statements considered in *Monks* are remarkably similar to the statements made in the OCF-9 and related correspondence in this case. Mr. Mayo submits that it is impossible for a statement to be both "misleading" and "clear and unequivocal" at the same time.

As well, the OCF-9 and related correspondence were not even clear and unequivocal in stating that Mr. Mayo lacked the status to claim attendant care and housekeeping benefits beyond the 104-week mark. The OCF-9 and related correspondence did not advise Mr. Mayo that he would be entitled to post-104 week attendant care and housekeeping benefits if he was deemed to be catastrophically impaired and made no mention of catastrophic impairment.

Mr. Mayo also submits that he would be entitled to retroactive attendant care once he was deemed to be catastrophically impaired. The jurisprudence has held that the Insured is entitled to apply for benefits such as attendant care and housekeeping benefits retroactively.[33] Thus Mr. Mayo submits that he is entitled to apply for post-104 week attendant care and housekeeping benefits upon being deemed catastrophically impaired. As well, Economical would in no way be prejudiced by this application for retroactive benefits as its own assessor, Ms. Knudstrup, agreed on January 24, 2007 that the Applicant continued to require attendant care and housekeeping and would likely continue to require them well into the future as his recovery had plateaued.

In the alternative, should it be determined that the OCF-9 and related correspondence represent a valid denial, then the Insurer should be estopped from relying upon its limitation defence. It has been held that "An insurer may be estopped from raising a limitation period against an applicant, in circumstances in which the applicant reasonably relies on the insurer's conduct, to the applicant's detriment."[34]

In this particular case, Mr. Mayo submits that the previous conduct of Economical induced Mr. Mayo to believe that post-104 week attendant care and housekeeping benefits had not been denied. Mr. Mayo points to three instances: The first was the April 4, 2013 correspondence from

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[33] *T(N) and Personal Insurance Company of Canada*, 2012 Carswell Ont 10008, at para. 40, Applicant's Book of Authorities, Tab 19.

[34] *Zeppieri and Royal Insurance Company of Canada,* 1994 Carswell Ont 7389, at para. 50, Applicant's Book of Authorities, Tab 22.

Mr. Littlejohn to the adjuster on file following a telephone conversation. In this correspondence, it was confirmed that the adjuster had an opportunity to review Mr. Mayo's file and advised that there were no denials "of any kind". The second was the fact that Mr. Mayo or his Counsel never received a response to the April 4, 2013 correspondence. The third instance was on December 16, 2014, when Economical sent correspondence to Mr. Mayo denying that he had sustained a catastrophic injury, and in this correspondence Economical stated that “it is our determination that your injuries do not meet the definition of catastrophic and therefore no entitlement to increased medical/rehabilitation or attendant care benefits exists.”[35]

Mr. Mayo takes the position that the December 16, 2014 letter clearly indicates that Economical was of the view that attendant care benefits had not been previously denied; otherwise there would be no need to mention it.

Findings

After having considered the submissions from counsel and review of the documentation filed, it is my finding that Mr. Mayo is precluded from proceeding to Arbitration with respect to his claims for attendant care and housekeeping benefits as he missed the two-year limitation to do so.

Economical provided Mr. Mayo a valid refusal to pay further attendant care and housekeeping benefits on March 30, 2007. It provided a clear reason on why benefits would no longer be paid. The OCF-9 also contained language regarding the dispute resolution process and a warning of the two-year limitation period to dispute the Insurer's refusal to pay further benefits. It also provided the wording of the *Schedule* that made clear the sections being relied upon to stop payment of the benefits do not apply in respect of an insured person who sustains a catastrophic impairment as a result of the accident. The notice of stoppage is found to be clear and unequivocal.

[35] Letter from Economical to the Applicant, December 16, 2014, Applicant's Record, Tab 5.

I also agree with Economical that the cases of *Howard* and *Monks* are distinguishable on the facts from the matter before me, and thus do not support Mr. Mayo's submission that Economical did not provide a proper denial to Mr. Mayo.

I find Economical's submissions compelling that the decisions of *Somerville* and *Ramalingam* are instructive in deciding the matter before me. While I recognize that in *Somerville* the Insured's benefits were terminated well before the two-year mark, I am in agreement with Arbitrator Rogers when he held the following: "The consumer protection objective does not create rights not found in the Schedule… There is no provision that allows him to make a further application for housekeeping and home maintenance benefits after termination."[36]

Further, I am in agreement with Economical's argument that to find an Insured's entitlement to post-104 week benefits commences retroactively once the Insured is determined to have suffered a catastrophic impairment places uncertainty and prejudice on the Insurer and results in an unfair and illogical outcome. As Economical highlighted in its submissions, it cannot have been the Legislature's intent to require Insurers, where a valid refusal to pay further benefits at the 104-week mark has been issued, not to be able to continue assessing an Insured and then be required to pay retroactive benefits once the Insured is deemed catastrophically impaired several years later.

I also find that Mr. Mayo has not demonstrated that recent jurisprudence on limitation periods and catastrophic impairment claims are relevant to the issue before me. Again, I agree with Economical's submission that although a catastrophic impairment determination affects a claimant's entitlement to a greater level of benefits; it does not dispose of the limitation period set out by the *Schedul*e and the *Insurance Act*, which are the facts before me in this matter.

I find no merit with respect to Mr. Mayo's argument that Economical should be estopped from relying upon its limitation defence due to its subsequent conduct after it terminated the benefits for two reasons. First, as Economical's submissions set out, where an Insurer's refusal to pay a benefit is clear and unequivocal, prior and subsequent events do not extend the time limits for

[36] *Supra*, note 12.

disputing the Insurer's refusal.[37] Second, Mr. Mayo has not demonstrated that his reliance on any such conduct resulted in him suffering any detriment.

EXPENSES:

The parties are encouraged to resolve this issue together. If they are unable to do so, they may schedule an expense hearing in writing before me according to the provisions of Rules 75-79 of the *Dispute Resolution Practice Code*.

______________________	November 18, 2016
Marshall Schnapp Arbitrator	Date

[37] *Supra*, note 21.

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario

FSCO A14-008047

BETWEEN:

GARETH MAYO

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. Gareth Mayo missed the two-year limitation period to dispute Economical's refusal to pay attendant care benefits and housekeeping benefits, as set out in the *Schedule*, such that he is precluded from proceeding to an Arbitration regarding his entitlement to these benefits.

___________________________	November 18, 2016
Marshall Schnapp Arbitrator	Date