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Ontario

2020 CanLII 12744 (ON LAT)

RECONSIDERATION DECISION

Before: Jesse A. Boyce, Adjudicator

Date: January 24, 2020

File: 19-000069/AABS

Case Name: P.V. and Economical Insurance

Written Submissions by:

For the Applicant: Robert H. Littlejohn

For the Respondent: Gerald S. George

Gurpreet Farmaha

OVERVIEW

[1] This request for reconsideration was filed by the applicant, P.V. It arises out of a preliminary issue hearing decision in which I found that P.V. was statute-barred from proceeding with his claim for post-104 income replacement benefits ("IRB") following a pre-emptive denial of same by the respondent, Economical.

[2] In the decision, I found that Economical's September 12, 2013 denial was clear and unequivocal and complied with all the requirements set out in *Smith v. Cooperators*.[1] I found that Economical's use of the words "not eligible" instead of "not entitled" was acceptable language to support a proper denial of, or refusal to pay, a benefit and relied on the decision in *Sietzema v. Economical*[2] for support. I rejected the contention that P.V. was an unsophisticated applicant and noted that he had counsel at the time.

[3] I rejected P.V.'s argument that Economical's denial was "pre-mature" as P.V. had not actually applied for the benefit, finding that such denials are still valid under current jurisprudence, chiefly *Bonaccorso v. Optimum*.[3] I found that the submission of an OCF-2 was not required to complete an application for IRB, as it was only of assistance in calculating the quantum of the benefit, not in determining entitlement. Further, I declined to exercise the Tribunal's discretion to extend the limitation period under s. 7 of the *Licence Appeal Tribunal Act,*[4] finding that P.V. had no "bona fide" intention to appeal the denial within the limitation period and that the length of the delay in contesting the denial beyond the limitation period was too great.

[4] Finally, I determined that even in the event that P.V. was successful on the limitation period argument before me, he would likely have difficulty getting over the "hurdle" of the secondary limitation period in ss. 4 & 5 of the *Schedule*, namely the requirement that P.V. be found to be "substantially unable" to perform his pre-accident occupation within 104 weeks of the accident in order to be eligible to receive post-104 week IRBs.

[5] P.V. requests I reverse my decision to statute-bar his application for post-104 IRBs. Pursuant to Rule 18.1 of the Tribunal's *Common Rules of Practice and Procedure,* I have been delegated responsibility to reconsider this matter.

RESULT

[1] 2002 SCC 30.
[2] 2014 ONCA 111.
[3] 2016 ONCA 34.
[4] 1999 S.O. 1999, Ch. 12, Sch. G. ["*LAT Act*"]

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[6] P.V.'s request for reconsideration is granted and the preliminary issue decision reversed. I find P.V. may proceed with his application to the Tribunal.

ANALYSIS

[7] The grounds for a request for reconsideration are contained in Rule 18 of the Tribunal's *Common Rules of Practice and Procedure*. A request for reconsideration will not be granted unless one of the following criteria are met:

a) The Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;

b) The Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made;

c) The Tribunal heard false evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or

d) There is new evidence that could not have reasonably been obtained earlier and would have affected the result.

[8] Here, the basis for P.V.'s request falls under both Rule 18.2(a) and (b). Specifically, P.V. argues four grounds for reconsideration. First, P.V. argues it was an error of law and fact for the Tribunal to find that he made a claim for IRBs before January 16, 2018. Second, P.V. submits it was an error of law to find that premature denials are valid pursuant to the Court of Appeal's decision in *Bonaccorso*. Third, P.V. states it was an error of law and fact to find that s. 7 of the *LAT Act* does not apply in these circumstances. Finally, P.V. argues that the Tribunal acted outside its jurisdiction and violated the rules of procedural fairness in finding that he made a claim for IRBs before January 16, 2018 and that premature denials are valid based on an incorrect interpretation of the Court of Appeal's decision in *Bonaccorso.*

[9] Economical's position is the opposite. First, it argues that the law is well-established that a benefit can be denied by an insurer pre-emptively and that the premature denial of a benefit may still be considered proper and trigger the limitation period, even where it was found that an applicant had not yet applied for said benefit. Second, that not only does it submit that P.V. claimed IRB, it submits that, on a proper reading of *Bonaccorso*, there is no pre-requisite that a benefit needs to be claimed or applied for. Finally, Economical submits that s. 7 of the *LAT Act* no longer applies.

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[10] While I am alive to all the arguments, I find my determination ultimately turned on the recent Court of Appeal decision in *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882, which was not released prior to the preliminary issue decision in this matter but is binding on the Tribunal. While I note that the respondent in *Tomec* has sought leave to appeal, the Court of Appeal decision remains binding on this Tribunal unless eventually overturned by the Supreme Court of Canada. Both parties provided submissions on the case prior to my reconsideration. P.V. relies on the rationale in *Tomec* while Economical argues that it does not apply.

Tomec and Discoverability

[11] The primary issue in *Tomec* was whether the two-year limitation period in both s. 281.1(1) of the *Insurance Act*[5] and s. 51(1) of the *Schedule* are subject to discoverability. While the benefits in dispute in *Tomec* differ from the IRBs in dispute here, the basic underpinning from the Court of Appeal decision is the same: first, whether there was a clear and unequivocal denial of benefits that triggered the limitation period; and second, whether the doctrine of discoverability applies to the limitation periods under the *Act* and the *Schedule*.

[12] The Court of Appeal in *Tomec* determined that "the analysis is not focused on whether a limitation period is tied to a fixed event [. . .] Rather, the question is whether the limitation period is related to the cause of action or the plaintiff's knowledge."[6] The Court rejected the insurer's argument that a refusal to pay a benefit is a specific event that is not tied to a cause of action, finding that the applicable limitation period "is tied to the accrual of the cause of action."[7] The Court reasoned that "[T]he refusal to pay a benefit and the ability to make a claim are inextricably intertwined in the cause of action. The refusal cannot be stripped out of the cause of action and treated as if it is independent of it."[8]

[13] The decision opines at length on policy rationales and what it considers to be "absurd results," pointing out that a "hard" limitation—such as the two-year limitation in *Tomec* and the one faced by P.V. in this matter—bar an applicant from receiving benefits before the applicant is even entitled to those benefits. While *Tomec* concerns enhanced benefits under the catastrophic category, I find the takeaway just as applicable here to P.V.'s IRB claim (notwithstanding the fact that he has subsequently been deemed catastrophic). In the Court's view, the "hard" two-year limitation put the applicant in "[. . .] an impossible situation,

[5] R.S.O. 1990, c. I.8.
[6] *Tomec*, relying on *Pioneer Corporation v. Godfrey*, 2019 SCC 42, 26 B.C.L.R. (6th) 1, at para. 32.
[7] *Id*., at para. 37.
[8] *Id*., at para. 36.

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where the time for claiming a benefit commences when she is ineligible to make such a claim. This is an absurd result."[9] I agree and follow the guidance provided by *Tomec*, finding that it applies equally in this matter.

An "absurd" error of law

[14] In the preliminary issue decision, I determined that Economical issued a valid, pre-emptive denial of the IRB based on the fact that P.V. did not have a substantial inability to perform the essential tasks of his employment because he was working full-time when he submitted his OCF-1 and OCF-3 and continued to work for three years and nine months following the accident. Relying on the decisions of *Zietzema* and *Bonnacorso*, I found that Economical was able to issue a pre-emptive denial of IRB on this basis and that the two-year limitation period began to run as a result. Applying *Tomec*, this was an error of law.

[15] *Tomec* makes clear that the applicable limitation period is tied to the accrual of the cause of action. At the time of his application, P.V. was working full-time as an executive. This is undisputed. Gradually, his accident-related impairments began to affect his performance and his job responsibilities were reduced over time and, eventually, his impairments resulted in his termination. At the time of his claim, P.V. was not seeking IRB—as alleged by Economical—because he was working full-time and, accordingly, in both his view and his physiotherapist's view, was not even eligible for an IRB as a result. In effect, his substantial inability to perform his essential tasks was not "discovered" at this point, but rather, was "accrued" over time as his impairments increased and his responsibilities at work diminished.

[16] To find that P.V. claimed IRB on September 12, 2013 while he was working full-time, when a medical professional had not yet indicated that he met the IRB test and where P.V. had not submitted an OCF-10 election form but was instead seeking rehabilitation benefits was an error by the Tribunal, as it lead to the type of absurd result contemplated by *Tomec*: where the time for P.V. to claim an IRB and the limitation period for him to dispute Economical's pre-emptive denial somehow both commenced and elapsed prior to P.V. even being eligible to make a claim for same.

[17] On review and with the guidance provided by *Tomec*, I find that P.V. did not "discover" his claim for IRB until his substantial inability to perform the essential tasks of his employment surfaced. To allow an insurer to pre-emptively deny IRB entitlement where it was not explicitly claimed (and where there was no eligibility)

[9] *Id*., at para. 52.

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and then also strictly adhere to the limitation period to reinforce that denial would, in my view, undermine the consumer protection nature of the *Schedule* and the policy rationale of limitation periods.

[18] Here, to allow Economical's pre-emptive denial to stand as a barrier to entry into the dispute resolution process unfairly punished P.V., as it effectively stated that he took too long to develop a substantial inability to perform his job and reach catastrophic impairment. Instead, P.V. should be commended for continuing to work full-time even while his condition deteriorated. On review, P.V. should not be punished for discovering his eligibility after an arbitrary limitation period elapsed and only following the denial of a benefit he never sought and was not even eligible for. I agree that to do so would be absurd, as Economical's refusal to pay the benefit and P.V.'s ability to actually make the claim would not be "inextricably intertwined" as required by *Tomec*.

[19] Indeed, I find on the evidence that P.V. did not make his claim for IRB before January 16, 2018, as his impairment and eligibility for same were discovered, or accrued, over time and not immediately following the accident. It follows that the pre-emptive denials issued by Economical prior to this date were premature and the Tribunal's finding of a valid denial was an error of fact because such a refusal would be, as *Tomec* describes, "stripped out of the cause of action and treated as if it is independent of it."[10] Further, the hard limitation period relied on by Economical and upheld by the Tribunal in the preliminary issue decision was also an error, as the accrual of P.V.'s cause of action had not yet triggered the limitation period.

[20] Accordingly, while I make no finding on his substantive entitlement to IRB, I do find, considering the guidance provide by the Court of Appeal in *Tomec,* that it was a reversible error to statute-bar P.V. from proceeding with his application at the preliminary stage.

[10] *Tomec*, at para. 36.

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CONCLUSION

[21] For these reasons, P.V.'s request for reconsideration is granted. I reverse my previous decision on the preliminary issue and find P.V. may proceed to the Tribunal with his claim. The parties are directed to contact the Tribunal to schedule a case conference to determine how to proceed.

Released: January 24, 2020

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Jesse A. Boyce, Adjudicator

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