COURT OF APPEAL FOR ONTARIO

CITATION: The Personal Insurance Company v. Tagoe, 2024 ONCA 894
DATE: 20241211
DOCKET: COA-24-CV-0365

Huscroft, Sossin and Dawe JJ.A.

BETWEEN

Samuel Tagoe

Applicant (Respondent)

and

The Personal Insurance Company

Respondent (Appellant)

Patrick M. Baker, for the appellant

Shahen Alexanian and David Kapanadze, for the respondent

Douglas Lee and Theresa McGee, for the intervener Licence Appeal Tribunal

M. Steven Rastin, Alexander M. Voudouris and Jessica M. Golosky, for the intervener Ontario Trial Lawyers' Association

Heard: November 8, 2024

On appeal from the order of the Divisional Court (Associate Chief Justice Faye E. McWatt and Justices James A. Ramsay and Wendy M. Matheson), dated October 13, 2023, with reasons reported at 2023 ONSC 5715, [2023] I.L.R. I-6422, allowing an appeal from a decision of the Licence Appeal Tribunal, dated February 28, 2022.

REASONS FOR DECISION

[1] This appeal raises questions about the limitation period that governs applications to the Licence Appeal Tribunal ("LAT") under s. 280 of the *Insurance Act,* R.S.O. 1990, c. I.8 when there is a dispute in respect of an insured person's entitlement to income replacement benefits under the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("*SABS*").

[2] We conclude that the Divisional Court did not err in finding that the doctrine of discoverability applies in this context. The appellant argues that the Divisional Court concluded that the respondent's application to the LAT was not limitations-barred by improperly reversing the LAT adjudicator's implied finding of fact about when the respondent first applied for income replacement benefits, on an appeal that was limited to questions of law. We disagree that the LAT adjudicator made any implicit factual finding on this point. Accordingly, the appeal is dismissed.

A. THE INCOME REPLACEMENT BENEFITS SCHEME

[3] When an insured person is employed at the time of an automobile accident, s. 5(1) of the *SABS* requires their insurer to pay income replacement benefits ("IRBs"), if the insured person "as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment". Section 6(1) of the *SABS* requires the insurer to pay IRBs during the period in which the insured person suffers this substantial inability, subject to the

exclusions in s. 6(2). Section 6(2)(a) excludes “the first week of the disability”, while s. 6(2)(b) provides further that the insurer is not required to pay IRBs:

> … after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.

[4] In summary, an insured person can claim IRBs for the first two years of disability due to an automobile accident if (i) the disability occurs within two years of the accident and (ii) the person is “substantially unable” to perform the essential tasks of their current job. However, after the first 104 weeks of disability, the person must show that they are completely unable to do any work for which they are “reasonably suited”.

[5] When a dispute arises over an insured person’s entitlement to receive any form of statutory accident benefits, including IRBs, the insured person or the insurer may apply to the LAT for dispute resolution: *Insurance Act,* s. 280. Section 56 of the *SABS* requires applications to the LAT to “be commenced within two years after the insurer’s refusal to pay the amount claimed.” The LAT’s decision may then be appealed to the Divisional Court “on a question of law only”: *Licence Appeal Tribunal Act,* 1999, S.O. 1999, c. 12, Schedule G, s. 11(6).

B. FACTUAL BACKGROUND

[6] The respondent, Mr. Tagoe, was involved in an automobile accident on April 28, 2016. He took one day off from his job as an IT professional, before returning to work the next day.

[7] On May 9, 2016, Mr. Tagoe submitted an Application for Accident Benefits form (OCF-1) to his insurer, the appellant The Personal Insurance Company ("TPIC"). In Part 8 of the application, headed "Income Replacement Determination", Mr. Tagoe provided his employment details and checked off a box indicating that his injuries were not preventing him from working.

[8] On May 17, 2016, a physiotherapist submitted a Disability Certificate form (OCF-3) on Mr. Tagoe's behalf. Mr. Tagoe signed the form, acknowledging that he was authorizing the physiotherapist to disclose information to his insurer, and that he was certifying that the information provided was true and correct.

[9] In Part 6 of the OCF-3, under the heading "Disability Tests and Information", the physiotherapist checked off a box indicating that Mr. Tagoe was "substantially unable to perform the essential tasks of [his] employment", and a second box indicating that he would be able to "return to work on modified hours and/or duties". However, the physiotherapist also added an explanatory note stating: "Patient has been advised not to return to work but due to financial reasons he has returned with pain and discomfort."

[10] On May 20, 2016, TPIC sent Mr. Tagoe an "Explanation of Benefits" ("EOB") form indicating that he did not qualify either for IRBs or for any other form of disability benefit. With respect to IRBs, the EOB stated:

> You do not qualify for an income replacement benefit because you do not suffer from a substantial inability to perform the essential tasks of your employment.

The EOB added that the OCF-1 and OCF-3 forms Mr. Tagoe had submitted both indicated that he was continuing to work. Inconsistently, the EOB also stated: "You do not qualify for a non-earner benefit because you qualify for an income replacement benefit."

[11] In his OCF-1, Mr. Tagoe had indicated that he was the main caregiver to his three children. However, the EOB stated that he did not qualify for a caregiver benefit because he was not catastrophically impaired, which is one of the criteria for receiving a caregiver benefit under s. 13 of the *SABS*, and had not purchased "optional caregiving coverage".

[12] Standard language at the end of the EOB stated that Mr. Tagoe had two years from the date of the refusal to pay benefits to file an application with the LAT.

[13] Mr. Tagoe continued to work for approximately 16 months after the accident, after which he ceased working for medical reasons. He underwent right hip arthroplasty surgery in August 2017, and was still convalescing from the surgery when he suffered a stroke in April 2018, which required hospitalization. Mr. Tagoe

maintains that the injuries he suffered in the April 2016 automobile accident have contributed to his present inability to work.

[14] On December 5, 2019, Mr. Tagoe submitted a second OCF-3 to TPIC, which indicated that he was now substantially unable to perform the essential tasks of his employment, and that he was not able to return to work on modified hours or duties.

[15] On June 17, 2020, TPIC sent Mr. Tagoe a further EOB that stated:

> Please refer to our explanation of benefits dated May 19 2016[1] [*sic*], which states that you are not eligible for income replacement benefit. Furthermore, you are statue [*sic*] barred from disputing our stoppage as it is over 2 years.

Although this letter referred to a "stoppage" of IRB payments, it is common ground that TPIC never paid IRBs to Mr. Tagoe at any point after the accident.

C. PROCEDURAL HISTORY

(1) The Licence Appeal Tribunal Proceedings

[16] Mr. Tagoe challenged TPIC's refusal to pay him IRBs by applying to the LAT. He filed his application on February 3, 2021. This was more than two years after the May 20, 2016 EOB, but less than two years from the June 17, 2020 EOB.

---

[1] The earlier EOB was actually dated May 20, 2016.

[17] TPIC argued that the two-year limitation period under s. 56 of the *SABS* began to run when TPIC sent Mr. Tagoe the May 20, 2016 EOB advising him that he was not eligible for IRBs. If so, Mr. Tagoe's application to the LAT, which he made nearly five years later, was brought out of time.

[18] An insurer's refusal to pay benefits must be "clear and unequivocal" to start the s. 56 limitation period, see e.g., *Sietzema v. Economical Mutual Insurance Company*, 2014 ONCA 111, 118 O.R. (3d) 713, at para. 13, leave to appeal refused, [2014] S.C.C.A. No. 172. Mr. Tagoe's position was that the May 20, 2016 EOB was not clear and unequivocal, and thus did not start the limitations clock.

[19] In the alternative, Mr. Tagoe argued that his entitlement to receive IRBs only became discoverable when he stopped working in the summer of 2017, and that the two-year limitation clock for him to apply to the LAT only began to run on June 17, 2020, the date of TPIC's second EOB refusing his claim for IRBs. If so, his application to the LAT in February 2021 was brought within the two-year limitation window.

[20] The crux of Mr. Tagoe's discoverability argument was that since he was still working in May 2016, when he submitted his initial OCF-1 and OCF-3 forms, he was not yet entitled to receive IRBs. He argued that "it was therefore premature for [TPIC] to deny IRBs when they had not been applied for."

[21] The LAT adjudicator disagreed, stating:

> There is a considerable body of case law that deals with premature benefit claims and with claims that are denied pre-emptively by an insurer. I find that a benefit can be denied by an insurer pre-emptively and that the use of the phrase "you do not qualify" would be found to be acceptable under the Schedule.

[22] The adjudicator also did not accept Mr. Tagoe's argument that the May 20, 2016 EOB was insufficiently clear to trigger the limitation clock. She accordingly ruled that he was statute-barred from challenging TPIC's refusal to pay him IRBs, and dismissed his application. She later dismissed Mr. Tagoe's request for reconsideration.

(2) The Divisional Court appeal

[23] Mr. Tagoe then appealed to the Divisional Court, which allowed the appeal on the grounds that the LAT adjudicator had erred by not properly considering whether Mr. Tagoe's IRB claim was discoverable in May 2016, when he was still working. (However, the Divisional Court did not give accept his argument that the May 20, 2016 EOB had not been clear and unequivocal).

[24] Citing this court's decision in *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882, 148 O.R. (3d) 438, leave to appeal refused, [2020] S.C.C.A. No. 7, Ramsay J. explained:

> In *Tomec*, the Court of Appeal held that a limitation period, without discoverability, created an absurd result because it effectively barred the appellant in that case from claiming benefits before the appellant was eligible for those benefits. The Court of Appeal underscored the

> purpose of the *SABS*, to maximize benefits for victims of motor vehicle accidents, and concluded that the limitation period was subject to discoverability.
>
> The respondent insurer [TPIC] argues that the unequivocal denial of May 2016 began the limitation period with respect to the subsequent claim for income replacement benefits even though the appellant had gone back to work the day after the accident. The respondent insurer relies on part of the initial request to the insurer, where the appellant claimed that he had a substantial inability to work. The respondent insurer submits that the appellant having so claimed, the denial of income replacement benefits in May 2016 created the dispute that had to be addressed in two years.
>
> I disagree with the respondent's position. The appellant did not qualify for income replacement in May 2016 and did not apply for it. I cannot distinguish this case from *Tomec*. The appellant was not required to apply for income replacement benefits before he was eligible for them. The adjudicator erred in law by failing to apply the doctrine of discoverability.

[25] Since the LAT had not addressed the substantive merits of Mr. Tagoe's claim that he was entitled to receive IRBs under ss. 5 and 6 of the *SABS* more than two years after his accident, the Divisional Court remitted the matter to the LAT for a new hearing.

[26] On March 15, 2024, a different panel of this court granted TPIC leave to appeal from the Divisional Court's decision.

D. ARGUMENTS ON APPEAL

(1) This court's decision in *Tomec*

[27] *Tomec* concerned a claim by an insured person who was injured when she was struck by a motor vehicle. She had received attendant care and housekeeping *SABS* benefits, but her statutory entitlement to these benefits ended after 104 weeks. Five years later her medical condition worsened, and she became "catastrophically impaired" within the meaning of s. 3.1 of the *SABS.* This made her eligible once again to receive *SABS* benefits. However, the LAT held that s. 281.1(1) of the *Insurance Act* (now repealed) and what was then s. 51(1) of the *SABS* – the predecessor to the current limitation period provision in s. 56 of the *SABS* – created a "hard" two-year limitation period that precluded her from claiming these benefits from her insurer. The Divisional Court agreed, and dismissed her appeal.

[28] Relying on the Supreme Court of Canada's intervening decision in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, this court reached a different conclusion. Hourigan J.A. found that in this context a hard two-year limitation period would create a "Kafkaesque regulatory regime" in which people who asserted their statutory right to receive benefits after an accident would be penalized if they then became catastrophically impaired more than two years later: *Tomec,* at paras. 47-48. He explained, at para. 55:

> There is a single reasonable interpretation of s. 281.1(1) of the *Insurance Act* and s. 51(1) of the *SABS*. The limitation period contained in those sections is subject to the rule of discoverability because it is directly tied to the cause of action that an insured can assert when denied benefits. A hard limitation period is contrary to the purposes of the *SABS* and the Supreme Court's guidance in *Pioneer*. In addition, a hard limitation period in these circumstances would lead to absurd results and is not consistent with the policy rationales that underlie limitation periods.

(2) TPIC's arguments on appeal

[29] In its leave application materials and in its factum on appeal, TPIC took the position that *Tomec* was "not applicable" in this case. However, in his oral submissions TPIC's counsel – who, we would note, was not counsel in the proceedings below – clarified that he is not arguing that the rule of discoverability does not apply to IRB claims. He also conceded in oral argument that it was an error for the LAT adjudicator to conclude that a pre-emptive denial of IRBs by TPIC in May 2016 would have started the limitations clock, even if Mr. Tagoe could not properly be seen as having applied for these benefits at that time.

[30] Instead, TPIC's counsel focused on a different argument, contending that the Divisional Court erred by finding that Mr. Tagoe "did not qualify for income replacement in May 2016 and did not apply for it." TPIC's argument has five main components.

[31] First, TPIC notes that this court has previously held that when an insured person has applied for a *SABS* benefit and has been denied by their insurer, they

cannot reset the limitations clock for making an application to the LAT by filing a second application with their insurer seeking the same benefits: see e.g., *Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165, 331 O.A.C. 48, at para. 30.

[32] Second, TPIC argues that when Mr. Tagoe submitted the May 17, 2016 OCF-3 form stating that he was substantially unable to perform the essential tasks of his employment – the statutory precondition for qualifying for IRBs under s. 5(1) of the *SABS* – he was "applying" for IRBs. TPIC contends that it does not matter that Mr. Tagoe's May 9, 2016 OCF-1 stated that his injuries did not prevent him from working, or that the May 17, 2016 OCF-3 also stated that Mr. Tagoe was continuing to work, albeit contrary to medical advice.

[33] Third, TPIC argues that there is a distinction between being statutorily eligible to receive IRBs, and being eligible to receive a non-zero amount of IRBs. Even though TPIC's position as set out in its May 20, 2016 EOB was that Mr. Tagoe "[did] not qualify" for IRBs because he did "not suffer from a substantial inability to perform the essential tasks of [his] employment", TPIC argues that this assertion by a busy claims adjuster should not be treated as conclusive of Mr. Tagoe's actual eligibility to receive these benefits. TPIC notes that a denial of benefits for a legally erroneous reason can still be effective: see *Turner v. State Farm Mutual Automobile Insurance Co.* (2005), 195 O.A.C. 61 (C.A.), at paras. 8 - 9.

[34] Fourth, TPIC contends that even though the LAT adjudicator decided the limitations issue on the erroneous basis that TPIC was entitled to pre-emptively deny IRBs to Mr. Tagoe, whether or not he had actually applied for these benefits, the adjudicator's reasons show that she also implicitly found as a fact that Mr. Tagoe had applied for IRBs in May 2016.

[35] Fifth, TPIC argues that since appeals from LAT decisions are limited to questions of law, the Divisional Court erred by making its own contrary factual finding that Mr. Tagoe "did not qualify for income replacement in May 2016 and did not apply for it."

(3) Mr. Tagoe's responding arguments

[36] Mr. Tagoe argues that the Divisional Court did not err by holding that the rule of discoverability applies to IRB claims, or by concluding that he did not qualify or apply for income replacement in May 2016.

[37] Mr. Tagoe's position is that he did not apply for IRBs in May 2016 because he was still working at the time, and accordingly did not meet the statutory requirement that his injuries had rendered him substantially unable to perform the essential tasks of his employment. He emphasizes that his OCF-1 form expressly stated that his injuries were not preventing him from working, and that the OCF-3 form submitted by the physiotherapist also stated that Mr. Tagoe was continuing to work.

[38] Mr. Tagoe's counsel also points out that TPIC did not take the position before the LAT or the Divisional Court that Mr. Tagoe had been eligible for IRBs and had applied for them in May 2016, but instead litigated the case on the basis that TPIC's denial of IRBs started the limitation clock, even if it was a pre-emptive denial. He argues that TPIC should not be able to advance a new argument for the first time on a second-level appeal.

E. ANALYSIS

[39] As a starting point, we accept TPIC's concession that the discoverability rule applies to IRB claims. Claims for *SABS* benefits, whether during the 104 weeks after an accident or later, are now both subject to the two-year limitation period in s. 56 of the *SABS*. This provision is essentially similar to the former s. 51(1), which this court held in *Tomec* did not establish a hard limitation period.

[40] We also accept TPIC's further concession that the LAT adjudicator erred by reasoning that TPIC could start the limitation clock by issuing a pre-emptive denial of IRBs to Mr. Tagoe, whether or not he had actually applied for these benefits. If Mr. Tagoe was ineligible to receive IRBs in May 2016, and for this reason did not apply for them at that time, his claim for IRBs only became discoverable after he became eligible to receive them.

[41] However, we do not agree with TPIC that the fact that Mr. Tagoe's May 17, 2016 OCF-3 form checked off the box stating that he was statutorily

eligible for IRBs inevitably leads to the conclusion that he was applying for these benefits at that time.

[42] We appreciate that there is a distinction between meeting the statutory threshold eligibility for receiving IRBs and establishing an entitlement to receive these benefits. There are various situations where an eligible person's benefits can be reduced to zero (e.g., if they are receiving disability benefits from another source: *SABS,* s. 47). Section 7(3)(a) of the *SABS* also contemplates that an insured person may receive employment income "during the period in which he or she is eligible to receive an income replacement benefit". However, Mr. Tagoe's statement in his OCF-1 that his injuries were not preventing him from working implied that he did not meet the threshold eligibility criterion of suffering "a substantial inability" to perform the essential tasks of his employment. Indeed, this was the conclusion reached by TPIC's adjuster who issued the May 20, 2016 EOB.

[43] To be clear, we are not suggesting that the evidence in this case automatically compelled the conclusion that Mr. Tagoe *was not* applying for IRB benefits in May 2016. The point is simply that there was conflicting evidence about his intentions at that time.

[44] We also do not agree with TPIC that the LAT adjudicator's reasons can be read as implicitly rejecting Mr. Tagoe's contention that he had not applied for IRBs in May 2016. Rather, her reasons show that she found it unnecessary to decide

this point, because she believed that TPIC was entitled to pre-emptively deny him these benefits, whether he had applied for them or not.

[45] We accordingly do not accept TPIC's argument that the Divisional Court improperly substituted its own finding of fact for a contrary factual finding that had been made by the LAT adjudicator.

[46] In the absence of any factual finding by the LAT adjudicator about whether the documents Mr. Tagoe submitted in May 2016 constituted an application for IRBs, the Divisional Court was entitled to "draw inferences of fact from the evidence" in order to determine the appeal: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(4)(a).

[47] We recognize that there was conflicting evidence on this issue, and that the Divisional Court's conclusion that Mr. Tagoe "did not apply for" IRBs in May 2016 was accordingly not inevitable. We also recognize that since the Divisional Court was remitting Mr. Tagoe's case to the LAT for further proceedings, the court could have chosen to leave this factual question for the LAT to decide. However, nothing in the materials before us suggests that TPIC asked for this remedy.

[48] We are not persuaded that it would be appropriate in the circumstances here for us to set aside the Divisional Court's finding that Mr. Tagoe had not applied for IRBs in May 2016, and vary the Divisional Court's remittal order to leave this factual issue to be determined by the LAT. Prior to arguing its appeal in this court, TPIC

chose to litigate the case on the basis that it was entitled to pre-emptively deny Mr. Tagoe IRBs, whether or not he had applied for them. We do not criticize TPIC's new appellate counsel for resiling from this position, which we agree is no longer tenable in light of *Tomec*. However, it would not be fair to Mr. Tagoe to grant TPIC a remedy that it did not seek in the court below, based on a new argument that it makes for the first time on appeal.

F. DISPOSITION

[49] The appeal is accordingly dismissed. In accordance with the parties' agreement, Mr. Tagoe shall receive $15,000 all inclusive as his costs on the appeal.

"Grant Huscroft J.A."
"L. Sossin J.A."
"J. Dawe J.A."