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2020 - A YEAR LIKE NO OTHER
TOP 10 ISSUES AT THE LAT

Stakeholders should be able to expect consistency and clarity in the LAT's interpretation of the *Schedule*, given that the Tribunal has been determining AB disputes for almost five years. However, our review of the top 10 issues in 2020 reveals growing inconsistencies in how the *LAT* adjudicates fundamental issues.

With an anticipated ruling coming from the Divisional Court in early 2021, the LAT's apparent jurisdiction to extend the limitation period pursuant to s.7 of the LAT Act was among the top stories we covered in 2020.

But there's more. We highlight 10 issues that stakeholders must be aware of and how this complicates risk assessment.

1. TOMEC & DISCOVERABILITY

In *Tomec*, the Ontario Court of Appeal held that the doctrine of discoverability applied to AB matters - specifically with respect to an injured party who only becomes entitled to certain benefits upon being deemed CAT.

The Tribunal ruled in ***R.S. v Pafco (19-006331)*** that the Court in *Tomec* did not intend to extend the doctrine of discoverability to specified benefit claims.

Yet in two instances, the same Adjudicator applied *Tomec* to:

1. ***P.V. v Economical (19-000069)*** - An IRB claim that was advanced well beyond 104 weeks
2. ***B.E.T. v Wawanesa (19-008722)*** - A NEB claim that was initially advanced due to physical impairment, but denied, who then became entitled to a "fresh" NEB claim based upon a late onset psychological basis.

No doubt we have not heard the last of this conundrum.

2. BREAKING NEWS – LARGEST AWARD…THEN REVOKED

It would stand to reason that in levying significant awards, the evidence in support of same would be crystal clear and impenetrable. This was found not to be the case when the *Malitskiy* award was overturned with two markedly divergent takes on award worthiness, or the lack thereof.

In ***Malitskiy v Unica (18-010164)***, the Tribunal issued the highest award recorded against an insurer for its "imprudent, inflexible, and immoderate" conduct. However, a different Adjudicator overturned the decision upon reconsideration, after finding that "none of the three…adjectives come to mind" and "the reasons supporting the award were not sufficient to justify the magnitude of the award…".

3. AWARD FOR NOT FOLLOWING NON BINDING CASE LAW

In ***F.A-W. v Aviva (18-008742)***, the Tribunal penalized an insurer for having ignored "jurisprudence." However, we highlight below two earlier decisions, which directly contrast with the Adjudicator's findings in *F.A.W.*, and do not appear to have been considered.

In ***L.G. v Unifund (18-008089)***, the Tribunal found, "a wrong conclusion, particularly in relation to a question of statutory interpretation that has not yet been conclusively determined by a court, is not enough for an award."

In the reconsideration of ***C.A. v Intact (18-000579)***, the Adjudicator upheld a decision of a hearing Adjudicator that declined to follow previous jurisprudence, noting that the hearing Adjudicator "considered the non-binding case law and rejected it. The decision is well reasoned and analyzed. I see no fault in the hearing adjudicator's interpretation."

Well, which interpretation can one rely upon?

4. OWN RECONS/REHEARINGS

Having an Adjudicator reconsider his or her own decision poses obvious initial concerns. Perhaps not surprisingly, success rate for own reconsiderations is significantly lower at 11%, in comparison to those heard by another member, which is at 35%.

In ***D.M. v Aviva (17-006525)***, a hearing Adjudicator reversed their original decision despite little change in the evidence. In the original decision, income received by the Applicant and reported to the CRA was considered as a "gift" as opposed to employment income. Upon rehearing, it was found that "there is no cogent and compelling evidence in support of the applicant's claim that the money was a gift."

In ***D.P. v Chieftain Insurance (17-007909)***, the Tribunal ordered a rehearing to address the legal test of entitlement to IRB. In the initial decision, the Applicant was found not to be entitled to IRB as the evidence did not specifically deal with the "substantial inability" test. In the rehearing, the Tribunal found that

Applicant's evidence supported entitlement, and was accordingly preferred over the Respondent's evidence. As a result, the Applicant was entitled to IRB up to the 104-week mark.

In ***M.M. v Aviva (18-000467)***, the Tribunal, upon reconsideration, now granted an award of 45% after finding that the insurer's actions were in fact "stubborn, inflexible, and unyielding".

In another rehearing ***S.K. & R.K. v Aviva (17-006866 & 17-006651)***, not only did the hearing Adjudicator amend the ACB quantum in the original decision, they took the matter one step further and ordered an award of 30% based on the insurer's failure to make any payment towards the outstanding.

Although it may be encouraging that a hearing Adjudicator can recognize their own legal errors, the parties may be left wondering how such a significant error occurred in the first place?

5. PRECEDENTS

The need for consistency and predictability were motivating factors for moving AB disputes to the LAT. While the Tribunal affirms it is not bound by its own "precedent", there do largely appear attempts at some level of consistency and predictability of outcomes.

In ***L.D. v Gore Mutual (18-011978)***, however, the Tribunal noted that even an Adjudicator's previous decision-making record provides no clear indication as to how similar matters will be decided.

In contrast, in ***K.H.N. v Guarantee (19-000081)***, the Adjudicator recused himself from a hearing, as he was seized of a matter related to a similar issue concerning a similar issue involving the same lawyer and the same clinic.

In ***H.K.C. v Aviva (18-011956)***, the Tribunal suggested that an Adjudicator need not provide reasons for departing from previous case law: "Adjudicators should not have to spend an inordinate amount of time reviewing Tribunal case law and providing reasons on why a case being relied upon by a party should not be followed. To be bound by Tribunal jurisprudence would hinder the independence of an Adjudicator...".

It remains to be seen whether cases where precedent is not followed represent an (un)anticipated loss due to the advent in the SABS world of "administrative justice"?

6. LAT IMPOSING OWN PENALTIES

Decisions from 2020 show that the Tribunal is not adverse to imposing penalties upon parties that are not found within the *Schedule*.

In ***N.M. v. Aviva (18-008710 & 18-008717)*** and ***B.M. v Unica (19-009381***), the Tribunal excluded IE evidence from the hearing where it was found that the Applicant attended an IE that was not properly secured. Then, in ***Beric v Guarantee (18-009494)***, it was ruled that the failure to provide a copy of the completed IE to the Applicant's health care practitioner renders the resultant denial as insufficient. The Divisional Court on another matter remarked the Beric conclusion was devoid of merit.

7. CRA DETERMINATIVE DESPITE OBVIOUS ISSUES?

Two cases from 2020 involve the Tribunal accepting CRA records into evidence to determine IRB quantum, notwithstanding clear evidence calling into question the integrity of the filed records.

In ***N.F. v Aviva (18-007077)***, the Tribunal ruled that credibility was "not a feature of this analysis… the focus is on the amount accepted by the CRA."

In ***N.Z. v Economical (18-009611)***, the Tribunal noted that "if it is good enough for the CRA, it is good enough for the *Schedule*," notwithstanding the insurer's "compelling questions" regarding the provenance of the records.

8. NO IRB QUANTUM = NO NEED TO ESTABLISH "ENTITLEMENT"

In two instances, the Tribunal rendered the Applicant's need to establish entitlement to IRB moot following the Applicant's failure to establish employment earnings as required under the *Schedule*.

In ***T.M. v Aviva (18-010477)***, there was no employment income, as the Applicant, while clearly in an "employment relationship", was on an unpaid leave for nine months preceding the accident. We contrasted this with an earlier case ***P.K. v Pembridge (18-000865)***, in which the Applicant was nonetheless deemed to be employed and entitled to IRB, despite having only worked 20/52 weeks.

The Tribunal again emphasized the importance of CRA records in ***Q.N.N. v Aviva (19-003381)***. In this decision, income confirmed on a T4 did not satisfy the requirements under the *Schedule*, as there had been no filing with the CRA for the required period prior to the accident.

9. CAT ASSESSMENTS

There was considerable activity at the LAT regarding CAT assessments over the past year, with a total of 23 hearing decisions. These decisions allow for a far better understanding as to what constitutes a "reasonable and necessary" CAT assessment.

We have seen the Tribunal on multiple occasions point to "needless bifurcation" of assessments, which artificially inflate the costs requested. We also reported on ten cases in two editions where "reasonable and necessary" was thoroughly canvassed. In addition, the credibility of assessors for both sides has often been called into question.

The Tribunal also reminded us in ***Z.J. v Aviva (18-012030)*** that a CAT assessment itself is not subject to a limitation period. In *Z.J.*, the Tribunal granted entitlement to a 2017 CAT assessment in relation to an accident from 2000.

10. MED LIMITS CONUNDRUM

In ***N.S. v TD (19-002494)***, the Tribunal addressed whether a claimant could be granted entitlement to medical/rehabilitation treatment in excess of available limits. Although the Applicant had not applied for a CAT determination, the Tribunal held that the Applicant is entitled to change her mind and forgo $14,000.00 worth of approved treatment that had not been incurred, in favour of the benefits sought at hearing.

Inconsistencies of Concern

The issues identified above show how the LAT struggles to consistently apply substantive and procedural law to issues fundamental to AB claims. Further challenges may be anticipated by the five-year limit on non-CAT medical claims rolled out in the June 1, 2016 amendments to the SABS.

These inconsistencies should concern all stakeholders. Assessing risk and understanding outcomes is predicated upon consistent application of the law. Stakeholders cannot operate unless this fundamental principle is maintained.