

**LICENCE APPEAL  
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**



**Safety, Licensing Appeals and  
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en  
matière de permis et des normes Ontario**

**Tribunal File Number: 18-001970/AABS**

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*,  
RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

**G. R.**

**Appellant(s)**

**and**

**Aviva Insurance Canada**

**Respondent**

**DECISION**

**ADJUDICATOR:** Thérèse Reilly

**APPEARANCES:**

**For the Applicant:** Joanna Leong, Counsel

**For the Respondent:** Paul Irish, Counsel

**HEARD:** In Writing on: January 7, 2019

## OVERVIEW

- [1] The applicant was involved in an automobile accident on October 21, 2016, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). The applicant was denied a benefit by the respondent and submitted an application to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [2] This application appeals the respondent's denial of a treatment plan for the cost of a chronic pain assessment. The applicant maintains he is entitled to the cost of the assessment as his pain and impairment continues and claims the accident exacerbated his pre-existing injuries. The respondent denied the treatment plan on the basis of its s. 44 insurer examinations and conclusion that the treatment plan is not reasonable and necessary. Further, the respondent disputes whether the accident caused the impairment.

## ISSUES IN DISPUTE

- [3] The issue in dispute is as follows:
- a. Is the applicant entitled to the cost of a chronic pain assessment by Dr. Stephen Brown in the amount of \$2486.00 submitted on October 26, 2017 and denied on February 26, 2018?
  - b. Is the applicant entitled to interest on any overdue payment of benefits?

## RESULT

- [4] For the reasons set out below, I find that the applicant is not entitled to the cost of the assessment for chronic pain. Interest is not payable as there is no overdue payment of benefits.

## ANALYSIS

- [5] There are two key questions for consideration:
- a) Did the accident cause the applicant's chronic pain disorder?
  - b) Is the treatment plan reasonable and necessary?
- [6] I agree with the respondent that the accident is not the cause of the applicant's chronic low back pain and neck pain. Alternatively, if I am wrong in that finding, I find the treatment plan is not reasonable and necessary.

### Did the accident cause the applicant's chronic back pain?

- [7] The respondent relies on the “but for” test to argue that the applicant has not proven that the accident caused the injuries as alleged.<sup>1</sup> The applicant must establish that his impairment would not have developed but for the accident. The respondent argues that the applicant has failed to establish this. Specifically, the respondent argues the applicant had chronic pain before the accident, his chronic pain persisted after the accident and that “he has failed to prove that he would not have developed chronic pain but for the accident.”<sup>2</sup>
- [8] The applicant argues that the accident aggravated his pre-existing low back chronic pain and neck pain. He argues the “but for” test does not require that he prove that the accident was the sole cause or even the predominant cause of his injuries. The accident need only be “a cause” and not necessarily “the cause” of the injury. The applicant maintains he can prove causation by showing that an accident aggravated or exacerbated an existing injury or condition.<sup>3</sup>
- [9] I find that, as a result of the accident, the applicant suffered, at most, a minor impairment, which the family doctor and Dr. Janoszyski concluded would resolve quickly and was temporary. I agree with the respondent that the applicant suffered from chronic back and neck pain prior to the accident which has existed and persisted for at least five years prior to the accident.<sup>4</sup> Records submitted into evidence demonstrate that since at least 2001 the applicant has suffered numerous workplace accidents and car accidents resulting in a chronic low back pain, neck pain and degenerative disc disease.<sup>5</sup> I am not satisfied on a balance of probabilities that the chronic back pain was caused by the accident. I find that he sustained a minor lumbar strain from this accident, and not chronic pain. As such, the accident did not cause chronic pain.
- [10] The cases discussed by the parties on the “but for” test do not explain the application of the test as claimed by the applicant. I do not accept that the test would only require the applicant to establish aggravation of a pre-existing condition. Even if I am wrong on this point, I find the evidence consisting of the family doctor records, the video surveillance and the report of Dr. Czok do not establish the pre-existing injury of chronic back pain was aggravated by the accident. As outlined above, the video clearly demonstrates the applicant is able to drive, and carry on a number of daily activities without difficulty.

---

<sup>1</sup> Written submissions of the respondent, paragraph 24, *Blake and Dominion*, 2015 ONCA 165.

<sup>2</sup> Written submissions of the respondent, paragraph 33.

<sup>3</sup> Reply submissions of the applicant, *Moore v. Getahun* 2014 ONSC 237, Tab I.

<sup>4</sup> See for example the clinical notes and records of the family doctor, Dr. Saeed, tab 3, the clinical notes and records of Lifemark Physiotherapy, tab 5 and records of the WSIB, tabs 1 and 2, written submissions of the applicant.

<sup>5</sup> Written submissions of the applicant, paragraphs 8 – 13. Written submissions of the respondent, paragraph 3.

Moreover, the applicant argues that he began to experience exacerbation of his low back and neck pain after the accident. I question the accuracy of this statement as the family doctor notes of October 3, 2016 show the applicant continued to complain about his low back and neck pain, which was prevalent at the time of the accident.

- [11] The video evidence contradicts the statements made by Dr. Brown in his chronic pain assessment, in which he indicated the applicant was not in a condition to return to work. The applicant at the time of the accident worked as a bathroom installer. The video, in my view, shows the applicant engaging in a number of activities which can be characterized as work. For example, he is seen assisting others to lift a bathroom sink onto the back of the truck.
- [12] Contrary to the claim made by the applicant that the video surveillance has little probative value, I find the video offers valuable insight into the applicant's post-accident functioning. Contrary to claims made by the applicant about restrictions on his movement and complaints of pain, the video does not demonstrate this. It shows the applicant being able to freely and without any signs of pain or of discomfort get in and out of a truck. In my assessment, the activities of the applicant as depicted in the video do not support his claim that he is continuing to experience significant injuries and pain after the accident and requires treatment for chronic lower back pain.

#### **Is the treatment plan reasonable and necessary?**

- [13] I agree with the respondent that the treatment plan is not reasonable and necessary. The respondent relies on the medical evidence of Dr. Czok, physiatrist, who examined the applicant and completed her report, confirming, in her view, that the applicant sustained minor lumbar sprain and strain as a result of the accident, on the background of a pre-existing chronic low back pain. Her conclusions remain unchanged despite receiving various medical reports from the applicant and the video surveillance. Her opinion was also corroborated by the findings of Dr. Janoszyski and by the applicant's neurologist who suggested only conservative treatment.
- [14] I find the video surveillance evidence persuasive and find that it undermines the conclusions reached by Dr. Brown. For example, Dr. Brown indicated the applicant cannot stand, twist or do heavy lifting. This is not evident in May 2018 from the video surveillance evidence, in which the applicant is seen assisting others to lift a sink into the back of a truck. Dr. Brown recommended physiotherapy as part of the treatment despite the fact that the applicant stopped physiotherapy since it made him feel worse. I also question Dr. Brown's conclusion that the accident caused disc generative disease. This condition is well documented in the medical records before the accident.

[15] For the reasons outlined, the treatment plan is not reasonable and necessary.

**CONCLUSION**

[16] The applicant is not entitled to the cost of the chronic pain assessment. As no benefits are payable, the claim for interest is dismissed.

**Released: June 6, 2019**

---

**Thérèse Reilly  
Adjudicator**