

**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**

**Citation: Andrew Wong vs. Aviva Insurance Company, 2020 ONLAT 18-  
012150/AABS**

**Released Date: 08/14/2020  
File Number: 18-012150/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:

**A.D.W.**

**Applicant**

and

**Aviva Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR: Robert Watt**

**APPEARANCES:**

Hamza Kisaka, Counsel

For the Applicant:

For the Respondent:

Matthew Owen Counsel

**HEARD: By way of written submissions**

## OVERVIEW

[1] The applicant was involved in an accident on June 5, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule*-Effective September 1, 2010 (the "Schedule"). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal-Tribunal-Automobile Accident Benefits Service ("Tribunal").

## ISSUES IN DISPUTE

[2] The issues in dispute were identified and agreed to as follows:

- i. Is the applicant entitled to receive a non-earner benefit in the amount of \$185.00 per week for the period January 1, 2017 to date and ongoing?
- ii. Is the applicant entitled to a medical benefit in the amount of \$3,786.42 for physiotherapy treatment, recommended by Physio Fix and Fitness in a treatment plan submitted on October 5, 2016, and denied on October 20, 2016 and denied again on December 2, 2016?
- iii. Is the applicant entitled to interest on any overdue payment of benefits?
- iv. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

## RESULTS

[3] The applicant is not entitled to receive a non-earner benefit in the amount of \$185.00 per week for the period January 1, 2017 to date and ongoing.

[4] The applicant is not entitled to a medical benefit in the amount of \$3,786.42 for physiotherapy treatment.

[5] As no benefits are overdue, the applicant is not entitled to interest.

[6] The applicant is not entitled to an award under Ontario Regulation 664

## BACKGROUND

[7] The applicant was rear-ended in a motor vehicle accident on June 5, 2016. He was a 68 year old man, who retired as a life insurance agent in 2006, at the age of 55. The impact was not significant.<sup>1</sup> The applicant had appeared to have Alzheimer's disease prior to the accident. This was confirmed by a CT of the

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<sup>1</sup> Property damage Photographs Respondent's Brief of Documents Tab A

head taken August 9, 2016.<sup>2</sup> There was minor damage done to the applicant's car. He did not have to attend at the hospital. The applicant was in a second accident on August 7, 2016, and complained after that about the neck, back, and right knee pain.

- [8] The applicant visited his family doctor Dr. Kayumi on June 7, 2016 complaining of pain in the left knee, discomfort with flexion and extension and slight restriction with flexion and extension in the head and neck. Dr. Kayumi diagnosed the applicant with soft tissue injuries and prescribed Tylenol as needed.
- [9] The applicant saw Dr. Kayumi on June 17, 2016 with the same complaints and was prescribed Vimovo as needed. Dr. Kayumi diagnosed cervical and right knee strain. He recommended physiotherapy and stretching exercises. Dr. Kayumi saw the applicant on July 5, 2016 and completed a disability certificate. Under part 6, the doctor noted that the applicant sustained an impairment that continuously prevented him from engaging in substantially all of the activities in which he ordinarily engaged, before the accident.
- [10] The applicant saw Dr. Malik Fawad, a chiropractor, on June 14, 2016 and on October 5, 2016, who recommended eighteen physical rehabilitation sessions for stretching and strengthening exercises.
- [11] The applicant saw Dr. R. Woods, psychologist, (IE) on November 29, 2016. The applicant reported to this doctor "that he maintained full independence with personal care function but was less active, continued to perform yard work chores and gardening but did so more slowly, contributed little to general housekeeping."<sup>3</sup> Dr. Woods opined from a psychological perspective that the applicant did not suffer a complete inability to carry on a normal life as a result of the accident.
- [12] Dr. Kucher, neurologist, (IE) assessed the applicant on December 1, 2016 where the applicant indicated that he continued to drive and performed the same household activities as he did pre-accident but at a slower pace. The applicant stated that he did spend time outdoors doing lawn care and snow removal, did spend time with family and socialized. Dr. Kucher opined that from a neurological perspective the applicant did not suffer a complete inability to carry on a normal life and that the injuries were minor.<sup>4</sup>

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<sup>2</sup> CT of the Head taken August 9, 2016 Respondent's Brief of Documents Tab B

<sup>3</sup> Respondent's Brief of Documents Tab H Multidiscipline Assessments Reports of Dr. Woods, Dr. Weisleder, Dr. Kucher.

<sup>4</sup> Ibid

- [13] Dr. L. Weisleder,<sup>5</sup> orthopaedic surgeon, IE assessed the applicant on December 5, 2016 and opined that the applicant had reached maximum medical recovery and that he did not suffer a complete inability to carry on a normal life as a result of the accident.
- [14] The applicant's wife Lai Har Lee indicated in a meeting with Dr. C. Cheung on May 6, 2018, geriatrician, that the applicant had been apathetic since his retirement. Dr. Cheung diagnosed the applicant with vascular cognitive impairment. The applicant's wife also indicated by way of affidavit and on cross examination on that affidavit, that the accident affected the applicant's functioning and he was unable to do the activities that he did pre-accident.

## ANALYSIS

### **Is the applicant entitled to receive a non-earner benefit in the amount of \$185.00 per week for the period January 1, 2017 to date and ongoing?**

- [15] I find that the applicant is not entitled to a non-earner benefit, for the reasons stated below.
- [16] Section 12 of the *Schedule* requires the applicant to have suffered an impairment as a result of the accident, and within 104 weeks after the accident, that causes the applicant to suffer a complete inability to carry on a normal life.
- [17] The applicant has to compare his pre-accident and post- accident life activities with weight be given to his pre-accident activities that he identifies as being important to him. The applicant must establish those changes amounted to his being continuously prevented from engaging in substantially all of his pre-accident activities.<sup>6</sup>
- [18] There has been no discussion and comparison of the pre-accident and post-accident functioning of the applicant by the applicant or by the medical doctors. There has been no comparison in any medical reports of the effect of the accident on the applicant's pre-accident functioning and post-accident functioning.
- [19] Dr. Kayumi saw the applicant on July 5, 2016 and completed a disability certificate. Under part 6, the doctor noted that the applicant sustained an impairment that continuously prevented him from engaging in substantially all of the activities in which he ordinarily engaged, before the accident. Dr. Kayumi has made a general statement without any analysis as to how he arrived at that

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<sup>5</sup> Ibid

<sup>6</sup> Heath v. Economical Mutual Insurance Company 2009 ONCA 391(CanLII) applicant's document brief tab A

conclusion. Dr. Kayumi's statement as to the applicant's impairment is contradicted by the applicant's own statements to Dr. Kucher and to Dr. Woods.

[20] I accept the applicant's own statements that he made to Dr. Kucher and to Dr. Woods where the applicant indicated that "he was independent with personal care, spent time on outdoor activities including gardening, enjoyed cooking, did routine yard work and was quite social".

[21] I accept the applicant's own evidence to the doctors regarding his functioning post accident in his daily activities, over the evidence of his wife who had indicated in her affidavit and cross examination that the accident affected her husband functioning.

[22] There is no medical evidence before the Tribunal to show that the accident caused an increase in mental and/or functional decline, etc.

[23] There is no medical evidence or affidavit evidence by the applicant that he suffered an impairment as a result of the accident, and within 104 weeks after the accident, that caused him to suffer a complete inability to carry on a normal life.

**Is the applicant entitled to a medical benefit in the amount of \$3,786.42 for physiotherapy treatment, recommended by Physio Fix and Fitness in a treatment plan submitted on October 5, 2016, and denied on October 20, 2016 and denied again on December 2, 2016?**

[24] I find that the applicant is not entitled to medical benefits in the amount of \$3,786.42 for physiotherapy treatment for the reasons set out below.

[25] Section 15 of the *Schedule* requires all medical benefits to be paid, if they are reasonable and necessary.

[26] Dr. Kayumi initially diagnosed the applicant with soft tissue injuries. There is no evidence that the applicant attended for medical assistance after August 2016 for musculoskeletal complaints.

[27] Dr. L. Weisleder noted in his report dated December 5, 2016 that the applicant had reached maximum medical recovery. The applicant still complained of neck, upper lower back and bilateral knee pain but indicated to Dr. Weisleder that his pain had improved by 40% and his knee pain had improved but that he was unable to quantify the amount.

[28] There is no medical evidence of any ongoing physical impairment that necessitated ongoing facility-based care in October 2016.

[29] I find that the benefit claimed is not reasonable and necessary.


## **INTEREST/AWARD**

[30] I find that no interest is owing as no benefits are owing. I find that that there is no award owing as the respondent has not unreasonably withheld or delayed payments.

## **CONCLUSION**

[31] The applicant's application is dismissed for the reasons set out above.

**Released: August 14, 2020**



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**Robert Watt, Adjudicator**