Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Ontario

Citation: *Singh v. Aviva Insurance Company*, 2021 ONLAT 20-001519/AABS

Released Date: 04/26/2021
File Number: 20-001519/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:

Gurjot Singh

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Jaipreet Nanra, Counsel

For the Respondent: Alexander Dos Reis, Counsel

HEARD: **Via Written Submissions**

OVERVIEW

[1] The applicant was involved in an automobile accident on October 21, 2017, and was paid an income replacement benefit ("IRB") by the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule* - Effective September 1, 2010 (the "*Schedule*").[1] Aviva terminated the IRB on the basis that the applicant did not suffer a substantial inability to perform the essential tasks of his pre-accident occupation as a result of the accident. The applicant disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

[2] The issues in dispute are as follows:

a. Is the applicant entitled to an IRB of $400.00 per week from October 18, 2018 up to the end of the 104-week period, being October 26, 2019?

b. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] The applicant has not demonstrated that he was substantially unable to perform the essentials tasks of his pre-accident employment, being prolonged sitting and walking, during the period in dispute. He is not entitled to payment of an IRB in the amount of $400.00 per week from October 18, 2018 to October 26, 2019 or interest under s. 51.

ANALYSIS

IRB entitlement and the applicant's employment history

[4] In order to receive payment for an IRB under the *Schedule*, the applicant must be (i) employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffer a substantial inability to perform the essential tasks of that employment; or (ii) was not employed at the time of the accident but was employed for at least 26 weeks during the 52 weeks before the accident and as a result of, and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident. The applicant bears the burden of proving, on a balance of probabilities, that he meets the test.

[1] O. Reg. 34/10, as amended.

[5] The applicant submits that he had a pre-existing right knee injury that was exacerbated by the accident. Additionally, he submits that he suffered serious and ongoing impairment of physical and psychological functions, which include his neck, left shoulder, left arm, low back, right knee, and right foot pain, as well as sleep disturbances, stress, flashbacks and vehicular anxiety.

[6] While he was not employed at the time of the accident, the applicant was employed for at least 26 of the previous 52 weeks as a security guard. On September 9, 2017, a month prior to the accident, he resigned from his position as a security guard at Securitas Canada Ltd. In submissions, he asserts that at this time, he was actively training for the physical evaluation to become a police officer. On November 21, 2017, Dr. Virdee advised the applicant to stop participating in the police test due to his injuries. On October 19, 2017, two days before the accident, he incorporated a technology and consulting business called Aariaz Media Marketing & Technology Solutions Inc. This was a sedentary working position.

[7] However, following the accident, he resigned from his position as Director on December 30, 2017, and the corporation was formerly dissolved on April 24, 2018. He submits that due to his physical injuries, poor concentration, feeling depressed, lack of motivation, increased stress and poor sleep, he was unable to work. Then, on May 31, 2019, the applicant incorporated Proace Business Solutions Inc., a digital marketing platform business, which is equivalent to a sedentary working position. On November 5, 2019, just outside of the IRB period in dispute, the applicant began working at Amazon. On December 12, 2019, he re-injured himself in the course of employment and, due to his inability to return to work, he was subsequently terminated from Amazon. He submits that he has not returned to physical employment since but was self-employed with his company Proace until at least June 2020.

[8] The applicant submits that due to the severity of his accident-related injuries, notably his right knee, he was unable to return to his pre-accident employment, participate in the police test or actively focus on his business. His attempt to return to the workforce was unsuccessful due to the exacerbation of his pre-existing knee injury.

IRB payment period and Aviva's termination

[9] The applicant was approved for an IRB from October 28, 2017 at a quantum of $400 per week based on his 2016 Notice of Assessment. On May 3, 2018, the applicant attended a s. 44 insurer's examination with Dr. Walters, General Practitioner, to address his ongoing IRB entitlement. Following the examination, Dr. Walters stated: "Yes. In my opinion he is likely substantially impaired from

prolonged walking at this time until his right [knee?] is clarified." However, in his Addendum Report dated September 21, 2018, Dr. Walters then opined, "[t]he diagnosis of right knee problems are not causally associated with the accident." As a result, Aviva stopped the payment of IRBs effective October 18, 2018.

[10] Aviva submits that while the applicant can use the income from his security guard job as proof of pre-accident income, he resigned from this job more than a month before the accident and therefore it cannot be said that, at the date of the accident, the essential tasks of his occupation even existed because his job at the date of the accident was desk work at Aariaz. In the alternative, Aviva submits that the applicant has not demonstrated that "prolonged walking and sitting" were truly essential tasks to his security guard job that could not be modified or that his accident-related injuries caused him a substantial inability to perform these tasks during the disputed period. Aviva submits that, contrary to para. 45 of the applicant's submissions, he has failed to explain how he was "forced" to work at a job that required 25 km of walking per day. Aviva thus submits that the applicant working at Amazon immediately following the period in dispute is proof that he could have easily managed the essential tasks of his pre-accident position of security guard.

The essential tasks of the applicant's pre-accident employment

[11] The applicant submits that the essential tasks of his pre-accident employment as a security guard were prolonged walking and sitting. Aviva asserts that the applicant has not provided evidence that prolonged walking and sitting were essential tasks of his job or that they could not be modified. While I agree with Aviva that the applicant did not provide a detailed job description of his specific security guard role at Securitas, I am prepared to accept, based on the consistent reporting to assessors and a dose of common sense, that his pre-accident role as a security guard required him to walk and sit for long periods of time. I find it reasonable to accept that these rather mundane tasks were essential to his role. There is no evidence that the applicant is attempting to exaggerate the labour associated with his former occupation.

[12] To this end, the applicant submits that Dr. Virdee, Dr. Chakravertty and Dr. Wilderman recommended that he avoid heavy lifting, strenuous activities, and prolonged walking due to his physical injuries sustained or exacerbated in the subject accident. Further, he points to Dr. Getahun's report that stated that his restricted range of motion and pain continues to affect his daily activities and that he meets the IRB test. Aviva raises issues of causation related to the knee injury,

the lack of medical documentation for the period in dispute and the s. 44 reports of Dr. Walters for support.

No contemporaneous opinion that IRB test is met during the relevant period

[13] The major flaw in the applicant's evidence is the lack of medical documentation or opinion from the period in dispute to indicate he was not capable of completing the two tasks that he has identified as being essential to his pre-accident employment as a security guard, namely: sitting and walking. Indeed, the applicant was engaged in two sedentary, office-type jobs during this very period, so I find it cannot be said that he was incapable of sitting for extended periods of time. In a similar vein, while I am alive to his complaints of knee pain (and to a lesser extent, his back pain), I find it difficult to accept that he was somehow substantially incapable of walking during the disputed period as a result of his accident-related pain where he was able to do activities like hiking and, as Aviva submits, capable of starting a job at Amazon (a position that required a significant amount of walking) less than two weeks after the end of the IRB period in dispute.

[14] The post-accident notes of Dr. Virdee reveal no complaints about the applicant's right knee. Contrary to the applicant's claims, I also do not find that Dr. Virdee advised against him completing the police test, but rather the notes indicate that the applicant reported that he "finds he will unable to do so due to pain, stiffness" and I do not consider the notation "Off Test" to be an indication that Dr. Virdee recommended that he not complete the test or, specifically, that he not complete the test as a result of injuries to his knee sustained in the accident. In any case, this is not a relevant part of the analysis.

[15] The first note concerning knee pain is not until December 30, 2017, which states that he had right knee pain and swelling for a few days, recurrent on prolonged walking, because he was "trekking last week". The applicant confirmed going hiking during this time, which led Dr. Walters to find, in the absence of complaints prior, that the hiking resulted in the applicant's knee pain. The January 4, 2018 form for a custom knee brace and orthotics did not relate the knee issue to the accident. The May 8, 2018 notation for the x-ray follow up revealed mild discomfort and indicates that the applicant was "still hiking" while also stating that he had difficulty with ambulation and with use of stairs. The May 24, 2018 note discusses his back and knee pain but only advises to get a personal trainer and continue taking medication. It does not state that he cannot work, that he cannot stand or sit for long periods of time.

[16] Meanwhile, the applicant was referred for an MRI by Dr. Virdee on September 3, 2018, which revealed results of a chronic high-grade tear of the anterior cruciate

ligament and mild to severe degenerative changes. On October 1, 2018, Dr. Chakravertty, orthopaedic surgeon, diagnosed the applicant with a "sprain/strain and ACL tear" that he relates to his "injury many years ago" based on the MRI. While Dr. Ckahravertty recommended quad strengthening through physiotherapy, he does not opine that the applicant is unable to work as a result of his knee pain or that he should avoid activities like walking and sitting.

[17] Similarly, the chronic pain report from Dr. Sandhu dated July 10, 2018 reveals complaints of pain and an inability to run and "be active" due to his pain, but the report does not mention the applicant's employment nor does it state that he is substantially unable to perform the tasks of sitting and walking. It recommended nerve block treatments, physiotherapy and Baclofen on a diagnosis of post-traumatic pain syndrome. However, the clinical notes that follow up to February 4, 2019 indicate the applicant wanted to focus treatment on his right shoulder and back. Notably, there is not a single report of knee pain and no direction that he abstains from employment or sitting and walking.

The medical opinions relied on by the applicant are outside of the disputed period

[18] Problematically, the applicant relies almost entirely on medical opinions that were procured well-after the period in dispute. For example, a chronic pain report by Dr. Wilderman, dated January 23, 2020, reports pain and "multiple injures after MVA" but does not opine on the applicant's ability to work and there is no opinion that he is substantially unable to perform the tasks of sitting or walking.

[19] In an orthopaedic report dated June 4, 2020, Dr. Getahun opined that the applicant "significantly aggravated his pre-existing right knee pathology as a result of the accident" and indicates that his prognosis for a full recovery was "poor considering the chronicity of his symptoms and the MRI findings." Despite seeing the applicant over two and half years post-accident, Dr. Getahun was able to attribute the knee injury directly to the accident, stating for the first time that it "may have been direct trauma from hitting the dashboard. However, he does not recall this" and then attributing the aggravation of his pre-existing knee pathology to "heavy application of the brake pedal." I was not directed to evidence to support these theories.

[20] Further, although the report acknowledges the applicant's re-entry into the labour market with Amazon immediately after the period in dispute and also acknowledges his self-employment where he works 30 hours per week, Dr. Getahun nonetheless opines that "his accident-related injuries have resulted in loss of competitive advantage" but does not identify which injury he is referring to. Later on, Dr. Getahun states that the applicant would not be able to tolerate the required walking and that he suffers a complete inability to carry out the essential

tasks of his pre-accident employment as a security guard doing patrol duty. Putting aside the fact that Dr. Getahun seems to be applying the post-104 weeks IRB test, I find it difficult to reconcile Dr. Getahun's retroactive opinion from June 4, 2020 that the applicant was unable to tolerate the walking associated with his security guard position during the period of October 18, 2018 to October 26, 2019, with his acknowledgment that the applicant was able to take a position as a warehouse associate with Amazon in November 2019, or over seven months prior to his assessment.

[21] Similarly, Dr. Virdee's medical opinion letter stating that the right knee was aggravated by the accident is dated September 16, 2020, despite there being no contemporaneous notes of his own to support this causation finding. Where all of the IRB opinions on which the applicant relies were made outside of the period in dispute, I find there is no contemporaneous medical documentation stating that he was substantially unable to perform the essential tasks of prolonged sitting and walking during the period for which he seeks IRB payment.

[22] To this end, I also disagree with the applicant's assertion that "the opinions of two orthopedic specialists establishes that his right knee injury is causally related to the accident, and therefore outweighs the opinion of a general practitioner" like Dr. Walters. Indeed, while Dr. Walters initially attributed the knee injury to the accident, on receipt of updated medical documentation, in his addendum report dated October 11, 2018, he states, "the clinical notes and records support no causal association between the subject accident and this gentleman's knee problems. His knee problems both predate the accident and a separate event caused him to have reoccurrence of knee pain." Where the x-rays and ultrasound supported osteoarthritic changes in the knee, Dr. Walters found that the knee injury was not causally associated with the accident and that the applicant no longer met the IRB test. Notably, Dr. Walters later released two more reports outside of the period in dispute: an in-person report dated January 14, 2019 and an addendum dated May 9, 2019, making similar findings.

[23] Accordingly, on a balance of probabilities, I find the applicant has not demonstrated that he was substantially unable to perform the essentials tasks of his pre-accident employment, being prolonged sitting and walking, during the period in dispute. As the medical opinions he relies on were procured outside of the period in dispute and where there is limited contemporaneous documentation of his substantial inability to perform his essential tasks during this period of entitlement, I find no reason to interfere with Aviva's determination to terminate the payment of IRBs. As no benefits are overdue, it follows that no interest is payable under s. 51.

ORDER

[24] The applicant has not demonstrated that he was substantially unable to perform the essentials tasks of his pre-accident employment, being prolonged sitting and walking, during the period in dispute. He is not entitled to payment of an IRB in the amount of $400.00 per week from October 18, 2018 to October 26, 2019 or interest under s. 51.

Released: April 26, 2021

Jesse A. Boyce
Vice Chair