



**Citation: Taylor v. Aviva Insurance Company of Canada, 2021 ONLAT 19-011891/AABS**

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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:

**Vernon Taylor**

**Applicant**

and

**Aviva Insurance Company of Canada**

**Respondent**

**DECISION AND ORDER**

**ADJUDICATOR: Nathan Ferguson**

**APPEARANCES:**

For the Applicant: Vernon Taylor, Applicant  
Adriano Pranzitelli, Counsel

For the Respondent: Aviva Insurance Company of Canada  
Hooman Zadegan, Counsel

**HEARD: In Writing November 30, 2020**

## **OVERVIEW**

- [1] The applicant ("VT") was involved in an automobile accident on September 12, 2017, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). VT requested non-earner benefits, funding for a chiropractic treatment plan and funding for a psychological assessment.
- [2] The respondent denied funding of these benefits. VT disagreed with this decision and as a result submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") to resolve the disputes.

## **ISSUES**

- [3] The issues in dispute were identified and agreed to as follows:
  - a. Is the applicant entitled to a non-earner benefit ("NEB") of \$185.00 per week from December 1, 2017 to date and ongoing?
  - b. Is the applicant entitled to \$1,779.34 for chiropractic services recommended by Healtopia in a treatment plan (OCF-18), dated September 11, 2018?
  - c. Is the applicant entitled to interest on any overdue payment of benefits?
- [4] In his written submissions, VT withdrew his application for \$2,254.72 for a psychological assessment recommended by Q-Medical in a treatment plan (OCF-18) dated August 27, 2019.

## **RESULT**

- [5] For the reasons that follow, I find on a balance of probabilities that the applicant is not entitled to the NEB claimed or interest on this benefit. I also find that the applicant is not entitled to \$1,779.34 for chiropractic services and interest on the amount outstanding.

## ANALYSIS

### *Non-Earner Benefits*

- [6] To qualify for NEBs, VT must establish that he suffers a complete inability to carry on a normal life as a result of the accident.<sup>1</sup> The applicant has the burden of proof in establishing this on a balance of probabilities. A complete inability to carry on a normal life in this context means that a person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.<sup>2</sup> I find on a balance of probabilities that VT is not entitled to NEBs for the period in dispute because VT did not suffer a complete inability to carry on a normal life as a result of this accident.

### *Medical Evidence*

- [7] The respondent relies primarily on the report of Dr. Rusen (Orthopedic Surgeon) issued June 13, 2018. This report is based on an assessment which took place May 30, 2018 and Dr. Rusen's review of the documents listed at Appendix A of the report.
- [8] The written submissions provided by the parties reveal a disagreement as to whether Dr. Rusen reviewed Rodney Pritchett's Occupational Therapy In-Home Assessment report dated June 4, 2018. Dr. Rusen plainly stated that the documents reviewed were "extensive" and are listed at Appendix A of his report.<sup>3</sup>
- [9] Appendix A does not include any document authored by Rodney Pritchett, nor any document labeled an Occupational Therapy In-Home Assessment. Therefore, I can only conclude that Dr. Rusen did not review Rodney Pritchett's report. I did not consider this determinative of any issue in dispute, although obviously Rodney Pritchett's description of the applicant's function must be considered by the Tribunal.
- [10] Dr. Rusen concluded that the applicant was "self-limited" in his efforts during physical assessment, that he was "an extremely poor historian", and that his "demonstrated range of motion to his cervical spine and right shoulder was more

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<sup>1</sup> The factors informing the determination of NEB entitlement are outlined in the leading case on this issue *Heath v. Economical Mutual Insurance Company*, 2009, ONCA 391 (CanLII) at para 50.

<sup>2</sup> O.Reg. 34/10 at s.3(7)(a).

<sup>3</sup> Orthopedic Surgery Assessment issued June 13, 2018, hereinafter "OSA", at p.4.

fluid and functional during casual observation as opposed to during formal assessment”.<sup>4</sup>

- [11] VT’s accident-related diagnosis in Dr. Rusen’s opinion was a contusion of the right wrist and hand, WAD1 cervical spine strain, soft tissue strain/sprain/contusion at the right shoulder and elbow, and a contusion to the right hip. His pre-existing conditions were not considered likely to significantly delay a healing time of 6-12 weeks and his prognosis was considered “favorable, although due to his multiple medical co-morbidities and chronic subjective complaints of pain, the prognosis related to subjective symptom resolution remains guarded”.<sup>5</sup> Dr. Rusen recommended that the applicant be removed from the Minor Injury Guideline’s limitations in treatment.
- [12] However, with respect to the treatment and assessment plans in question, Dr. Rusen considered these not reasonable and necessary because he is, “unable to attribute any ongoing impairment as being directly related to the subject accident... current presentation is more consistent with a flare of his underlying inflammatory arthropathy or another non-orthopaedic etiology... he does not require any further physical therapy in relation to his accident related injuries as I feel his accident-related injuries have objectively resolved... he may benefit from continued physical therapy in relation to his underlying non-accident related medical conditions...”<sup>6</sup>
- [13] As to his function, VT reported to Dr. Rusen that he lives alone, uses a cane in his right hand when mobilizing, is assisted by a nurse in conducting dressing changes for a pre-existing condition and is “independent with respect to completing all other personal care tasks” including sweeping and completing laundry. VT outlined that a third party cleans his home every two weeks, he is unable to play basketball and he has difficulty playing with his children and walking any distance. He was able to stand only ten minutes before needing to sit and was not able to sit for “any period of time” because of unrelated rectal bleeding. VT was in receipt of Ontario Disability Support Program (ODSP) assistance for approximately two years before this assessment was completed, predating the accident.<sup>7</sup>
- [14] Dr. Lam completed a Health Status Report in the context of VT’s application for ODSP assistance on March 24, 2015 and outlined at that time that the applicant was severely or completely limited in many activities of daily living including

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<sup>4</sup> OSA at p. 9.

<sup>5</sup> OSA at p.11.

<sup>6</sup> OSA at p.12.

<sup>7</sup> OSA at p.8-9.

housekeeping, using commercial services, walking and attending to personal hygiene for reasons unrelated to this accident that were anticipated to last more than one year. In fact, VT was able to function within normal limits in just 3 of 24 listed categories.<sup>8</sup> This suggests that VT's function in 2015 was widely and significantly compromised in virtually all areas. This is difficult to reconcile with the notion that he was actively playing basketball and performing other activities such as housekeeping unimpeded but for the intervention of the accident, which was advanced in this application.

- [15] VT relies on the reports of Dr. Goldstein<sup>9</sup> and Rodney Pritchett<sup>10</sup> to support his assertion that he is completely unable to carry on a normal life.
- [16] Mr. Pritchett provides the most detail with respect to an objective evaluation of the applicant's post-accident function. I considered this report important as a result. However, I note that the report does not describe any objective testing of VT pre-accident as Mr. Pritchett did not assess him before the accident. That is, most details regarding VT's pre-accident activity are subjectively reported.
- [17] VT reported to Mr. Pritchett that he was already using a housecleaner every two weeks before the accident as a result of his surgery which was not related to the accident. VT also stopped making meals and doing grocery shopping, relying on his mother for these tasks, because of his limitations which were present before the accident.<sup>11</sup> Mr. Pritchett confirmed that the applicant continues to live alone, does his personal care tasks at a slower pace due to pain, he is able to adequately supervise his children during visits, he is able to use public transit and walk or receive rides from friends when out of the home. He is able to socialize with friends and family, although less frequently than before the accident and reports that he is unable to make or record music.<sup>12</sup>
- [18] Mr. Pritchett concluded that "he has been able to maintain participation in personal care tasks, light housekeeping, nonphysical aspects of caregiving and some aspects of his pre-accident leisure" although VT was "unable to resume making/recording music" and reported diminished mobility. On the whole, VT "presented with sufficient functional ability to manage participation in many

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<sup>8</sup> Health Status Report dated March 24, 2015 at p.3-4, 12.

<sup>9</sup> Chronic Pain Assessment dated November 3, 2019, hereinafter "CPA".

<sup>10</sup> Occupational Therapy In-Home Assessment dated June 4, 2018, hereinafter "OTIHA".

<sup>11</sup> OTIHA at p.16.

<sup>12</sup> OTIHA at p. 16.

aspects of his pre-accident daily activities. However, his overall function appeared quite limited even before the subject motor vehicle accident”.<sup>13</sup>

- [19] Dr. Goldstein assessed the applicant on October 23, 2019 and provides the most supportive opinion evidence with respect to VT’s entitlement to NEBs. I gave this report less weight than the others because it is not consistent with the balance of reporting, including the subjective reporting of the applicant recorded by both Dr. Rusen and Mr. Pritchett. For example, Dr. Goldstein reported that “Prior to the subject motor vehicle accident, [VT] indicated that he was independent with all housekeeping activities. Now his mom cooks, his friends bring food... and he has a cleaning lady who comes every other week...” and requires assistance from his nurse in personal grooming. Additionally, VT reported an inability to visit friends.<sup>14</sup> Dr. Goldstein also reported that VT was “compliant with all aspects of his care”.<sup>15</sup>
- [20] This is not reconcilable with Mr. Pritchett or Dr. Rusen’s reporting above that the applicant was limited in much the same fashion before and after the accident in terms of cooking and cleaning, and remains independent in his grooming, and able to socialize with friends less frequently.
- [21] The indication that the applicant had been compliant in all aspects of care was also directly refuted by a Physiotherapy Discharge note dated May 4, 2015 in which Doris Seto, physiotherapist, stated: “[the patient] was not motivated or compliant with his treatments. He hasn’t attended physio since April 6, 2015. I tried to contact him to update his current status but got no response.... He is discharged from our active care”.
- [22] I find that these disparities bolster Dr. Rusen’s opinion that the applicant is a poor historian and detract from the persuasiveness of Dr. Goldstein’s report overall. This inconsistency in reporting undermines VT’s reliability and this is important in this instance as there is very little evidence regarding VT’s function before the accident that corresponds with his assertion that the accident significantly impacted his function.
- [23] The ODSP application indicates that the applicant was quite severely limited by March 24, 2015. The applicant’s subjective account to both Dr. Rusen and Mr. Pritchett corresponds with this. The numerous reports outlining his diagnoses and treatment before the accident also appear in keeping with a significant level of functional impairment due to factors outside this accident and which were not

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<sup>13</sup> OTIHA at p.19.

<sup>14</sup> CPA at p.10.

<sup>15</sup> CPA at p.20.

significantly altered by the accident with the exception of some slowing and increased perception of pain.

- [24] The only documentation available to me in this instance which is particularly supportive of VT's position is the report of Dr. Goldstein, which I did not find persuasive for the reasons outlined above, and a single form referred to in VT's written submissions.<sup>16</sup> I have reviewed the form, in which Dr. Sokoluk has checked off the following boxes: doing well, good grip strength, walking comfortably, not needing analgesics, not needing NSAID's, and managing with ADL's. Dr. Sokoluk also confirmed VT is prescribed a medication for conditions unrelated to the accident and wrote that "He is dramatically better" with the medication.
- [25] I did not consider Dr. Sokoluk's form persuasive in this instance for three essential reasons. First, the form does not detail any testing or evaluation performed in arriving at the conclusions offered. That is, there is no indication that any physical assessment or direct observation of any activity was performed, in contrast to the reports of Dr. Rusen, Dr. Goldstein and Mr. Pritchett among others.
- [26] Second, the form is a series of checkboxes requiring and permitting very little insight or elaborative detail – it is simply much less descriptive than the other reporting I reference above. Dr. Sokoluk did not describe VT's meal-making, housekeeping, self-care, socialization, participation in his community, or any other aspect of his function with any specificity. The form also does not correspond to the applicant's ongoing receipt of ODSP assistance, or the level of limit otherwise described by his treating practitioners and even himself.
- [27] This brings me to the third and final reason I did not consider the form persuasive. The content of the form plainly relies on the self-reporting of the applicant. As outlined above, I did not find the applicant's self-reporting consistent. As a result, I did not find this form sufficient to outweigh the balance of documentation provided to me despite its general description of improvement in function.
- [28] The OCF-3 completed by Dr. LaDelfa on November 7, 2017 is also in support of the assertion that VT is completely unable to carry on a normal life. This form is also less persuasive than the balance of medical documentation in my view as it

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<sup>16</sup> Dr. Sokoluk, Rheumatologist form dated June 2, 2016, see Written Submissions of the Applicant at para. 25.

contains less elaborative detail, observation and testing and is not supported by the more persuasive reporting outlined above.

- [29] The parties did not provide an argument or position with respect to a reasonable period of time during which I ought to compare the applicant's pre and post accident function as anticipated in *Heath*. As both parties are silent on the matter, I concluded that the reasonable period of time was approximately March 24, 2015 at which time VT asserted he was disabled by factors other than this accident, to the date of the accident (September 12, 2017) at which time his function may have been altered. There may have been fluctuations in activity as a result of various treatments (for example surgeries and complications in recovering from the same) during that period, but I find that VT's activity and ability level before being impacted by this accident can be best observed during this time frame.
- [30] In light of the foregoing, I find on a balance of probabilities that the September 12, 2017, accident did not cause a complete inability to carry on a normal life. VT's function, as outlined above, remained largely similar before and after this accident.

*Is the September 11, 2018 Chiropractic Treatment Plan Reasonable and Necessary*

- [31] The respondent argues that VT's limitations in function are attributable to factors other than the accident that took place September 12, 2017. Rather, the respondent submits that these limitations are due to the applicant's complicated medical history and various other diagnoses. Therefore, the respondent argues the symptoms described are not related to the accident. If this is so, then VT could not qualify for NEBs and the treatment plan submitted ought not to be considered reasonable and necessary.
- [32] VT submits that the symptoms that he experiences are related to the accident and that the accident is a sufficient cause of these symptoms to require treatment on an ongoing basis, and to have significantly impeded his function. I have addressed the applicant's function; it is not necessary to repeat that analysis here.
- [33] As to the chiropractic treatment plan in dispute, I find that this is not reasonable and necessary on a balance of probabilities. The assessors engaged in this matter appear to agree that VT experiences a degree of pain, regardless of its source or its correspondence to his limitations. I have no doubt that VT does experience pain.



- [34] Dr. LaDelfa's OCF-18 identified the goals of treatment as "pain reduction", "increase in strength" and "increased range of motion" seeking to achieve "return to activities of normal living". There were several barriers to recover anticipated including "numbness", "tingling", "previous surgery to right shoulder", "rheumatoid arthritis, diabetes, low iron and hidradenitis suppurativa".
- [35] The Tribunal has long held that the management and diminishment of pain is a reasonable goal of treatment. While I agree that VT experiences pain, I find that VT failed to establish on a balance of probabilities that the pain he experiences requires this form of treatment or would be significantly reduced by the treatment proposed.
- [36] Dr. Rusen concluded that further physical therapy was not warranted because "his accident-related injuries have objectively resolved". Dr. Goldstein did not agree and concluded that ongoing physical therapy with both passive and active components would be beneficial for VT.<sup>17</sup> However, for the reasons outlined above, I preferred the report and included opinion evidence of Dr. Rusen as more persuasive than that of Dr. Goldstein. Thus, while it is true that pain reduction is a reasonable goal of treatment, in this instance the reduction of pain appears unrelated to the accident.
- [37] Even if this were not so, I find that the treatment described appears unlikely to result in significant benefit and therefore the goals of treatment are not being, and are not likely to be, reasonably met. This is because VT, according to the documentation provided, has attended many such treatments in the past and continues to report that his function and pain have not improved. Moreover, he was noncompliant with passive treatment (physiotherapy) in the past, declines to participate in treatment such as home-based physiotherapy which has been recommended to him, and reported to Mr. Pritchett that despite treatment similar to the proposed plan he has experienced "no recovery" after the accident.<sup>18</sup>
- [38] As a result, I find that the goals of treatment are not being reasonably met and are not likely to be met.
- [39] Having made these findings, it follows that I find that the applicant has not demonstrated that the treatment plan submitted is reasonable and necessary on a balance of probabilities.

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<sup>17</sup> CPA at p.18.

<sup>18</sup> OTIHA at p.15.

## **ORDER**

[40] VT is therefore not entitled to NEBs for the period in dispute and is not entitled to payment of \$1,779.34 for chiropractic services recommended in a treatment plan (OCF-18), dated September 11, 2018. It follows that VT is not entitled to interest on any overdue payment of benefits.

**Date of Issue: August 11, 2021**



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**Nathan Ferguson, Adjudicator**