



Citation: Fahritdinov v. Aviva General Insurance, 2021 ONLAT 19-009897/AABS

**Release date: 10/05/2021
File Number: 19-009897/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:

Mirshehroz Fahritdinov

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Yousef Jabbour, Counsel
Anthony Mancuso, Counsel

For the Respondent: Alexander V. Dos Reis, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Mirshehroz Fahritdinov, ("the Applicant"), was involved in an automobile accident on April 25, 2017, and sought benefits from Aviva General Insurance, ("the Respondent"), 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

- [2] The issues to be decided at the hearing are:
1. Is the applicant entitled to non-earner benefits, ("NEBs"), in the amount of \$185.00 per week for the period September 17, 2018 to April 23, 2019?
 2. Is the applicant entitled to an attendant care benefit, ("ACBs"), in the amount of \$3,183.83 per month for the period from September 8, 2018 to-date and ongoing?
 3. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] I find that the Applicant is not entitled to the benefits claimed. No interest is payable.

BACKGROUND

- [4] The Applicant was the driver of a vehicle which struck another vehicle that had made an improper turn. The Applicant sustained injuries to his neck, left shoulder, back, and right knee as a result of the accident. Because of his accident-related injuries, the Applicant underwent surgical intervention and had ACL reconstruction with hamstring autograft and a partial meniscectomy on his right knee. The surgery occurred on June 20, 2018, about 14 months following the accident.
- [5] The Applicant claims entitlement to NEBs and ACBs for the period starting almost three months following his knee surgery. The onus is on the Applicant to prove that he is entitled to the benefits. The Respondent holds that the Applicant has failed to meet his onus.

NON-EARNER BENEFITS

- [6] Pursuant to section 12 of the *Schedule*, the Applicant must suffer a complete inability to carry on a normal life as a result of and within 104 weeks of the accident in order to qualify for NEBs. The test for NEBs involves a consideration of the Applicant's activities and life circumstances pre-accident and compares them to their activities and life circumstances post-accident. Sustaining serious injuries or minor life changes does not automatically entitle the Applicant to NEBs. Rather, he must show that his life circumstances have changed and that the change must be significant enough to continuously prevent him from substantially engaging in all the activities that he engaged in before the accident.
- [7] I find that the Applicant has failed to meet his burden to prove that he suffers a complete inability to carry on a normal life as a result of the accident.
- [8] The Applicant refers to no evidence that is contemporaneous with the period he claims NEBs. The Applicant claims NEBs for the period starting September 17, 2018 but provides no medical or other records beyond that date. Thus, there is no medical evidence to support his claim.
- [9] Submissions are not evidence. The Applicant claims an inability to do certain activities like working, attending ELS classes, boxing, running, exercise at the gym, and lifting or other tasks that involve overhead reaching but gives no evidence to support these claims. Tax, school, boxing club, or gym records could easily verify these claims. Likewise, objective testing documenting functional impairments, or recommendations from physicians to cease the activities listed above, would be compelling. Here, I have no such information.
- [10] The contemporaneous medical evidence indicates that the Applicant carries on a normal life. Dr. D. Milne assessed the Applicant for an insurer's examination ("IE") and report, dated October 26, 2018. Dr. Milne found that the Applicant "presented with excellent recovery of the right knee post-surgery and post-rehab and he no longer presents with any objective cervical or lumbar spine or shoulder joint impairment that would require continued therapeutic intervention."
- [11] Dr. F. Abuzgaya, orthopaedic surgeon, assessed the Applicant for an IE and issued a corresponding report dated September 7, 2018. Dr. Abuzgaya's assessment found that the Applicant had mild laxity of the ACL of the right knee and required a brace and ongoing physiotherapy. Despite this, Dr. Abuzgaya concluded that the Applicant did not suffer from a complete inability to carry on a normal life as a result of the accident.

- [12] Dr. S. Moshiri, psychologist, assessed the Applicant for an IE and issued a corresponding report dated September 7, 2018. Dr. Moshiri noted that the Applicant stated that from a psychological perspective, the accident has not affected his activities of daily living. Upon examination, Dr. Moshiri diagnosed the Applicant with an adjustment disorder with mixed anxiety and depressed mood but maintained that he does not suffer a complete inability to carry on a normal life as a result of the accident.
- [13] Considering the evidence before me, and for the reasons above, I conclude that the Applicant does not suffer a complete inability to carry on a normal life as a result of the accident.

ATTENDANT CARE BENEFITS

- [14] Pursuant to section 19 of the *Schedule*, ACBs shall pay for all reasonable and necessary expenses that are incurred by the Applicant for services provided by an aide or attendant. The onus is on the Applicant to prove that he required the care of an aide or attendant and that he incurred the expense of hiring one. The Applicant may still be entitled to ACBs despite not hiring an aide or attendant if he can prove that the expense was not incurred because the Respondent unreasonably withheld or delayed payment of the benefit.
- [15] I find that the Applicant has failed to meet his burden to prove that he required attendant care services during the period in dispute.
- [16] The Assessment of Attendant Care Needs Report and Form 1, by R. Zakrzewski, occupational therapist, dated June 27, 2018 ("the June 27 Form-1") is the most relevant document provided by the Applicant. It was done one-week following the Applicant's right knee surgery and recommends \$3,183.83 per month in attendant care services, which is above the \$3,000.00 limit provided by section 19(3)(1)(i) of the *Schedule*.
- [17] The June 27 Form-1 is representative of the Applicant's situation almost immediately following surgery and not his situation for the period he claims ACBs, as submitted by the Respondent. The Applicant submits that the June 27 Form-1 is relevant for the period he claims entitlement to ACBs but fails to appreciate that he has since recovered from knee surgery and no longer needs such care. The June 27 Form-1 states that the Applicant requires assistance with, amongst other things, dressing and undressing his upper body, cleaning and drying his hair, food preparation, laundering bedding as a result of incontinence/spillage, ensuring his comfort and safety in the environment, preparing and sorting clothes for wearing and laundry, the co-ordination of

attendant care services, cleaning the Applicant and equipment after bowel movements, assistance with exercise, checking the Applicant for sores, and bathing and drying the Applicant. In contrast, the Applicant's submissions and self-reports to assessors indicate much greater functionality. He reported to Dr. Moshiri that he showers independently. He reported to Dr. Milne that he completes most of his housekeeping and home maintenance tasks and had no limitation with respect to personal care.

- [18] There is no evidence to show that the Applicant requires ACBs nearly three months post-surgery. The Form-1 by L. Goldlust, occupational therapist, dated August 28, 2018 found that he required no further attendant care assistance. Occupational therapist Goldlust examined the Applicant about two months following the surgery, on August 14, 2018, and observed that he demonstrated the functional ability and range of motion to perform all his attendant care tasks and also confirmed his ability to do so.
- [19] The Applicant provides no evidence to counter occupational therapist Goldlust's Form-1. As noted above, the Applicant provides no evidence contemporaneous with the period he claims entitlement to ACBs and NEBs. As noted by the Respondent, the Applicant's position that the June 27 Form-1 is an accurate representation of his post-surgery needs assumes that his health status will never improve beyond the state it was in at one-week post-surgery.
- [20] Lastly, the Applicant provides no proof that he incurred the attendant care services or that it was not incurred because the benefit was unreasonably withheld or delayed. The Applicant makes no submissions on the subject and provides no evidence to suggest that he did not incur the services as a result of the benefit being unreasonably withheld.

CONCLUSION

- [21] The Applicant sustained injuries to his neck, shoulder, back, and knee as a result of the accident. He required surgical intervention as a result of his knee injury and has since recovered from that surgery.
- [22] While the Applicant may have experienced some changes to his life, he has failed to demonstrate that he suffers a complete inability to carry on a normal life, as a result of accident-related impairments, during the period spanning September 17, 2018 to April 23, 2019. Thus, the Applicant is not entitled to NEBs as claimed.

[23] Similarly, the Applicant required attendant care services immediately following the June 20, 2018 surgery on his right knee. However, he has recovered from the surgery and no longer needs the assistance claimed. Nothing in the evidence before me suggests that the benefit was incurred or that it was not incurred due to the Respondent unreasonably withholding payment. Thus, the Applicant is not entitled to ACBs as claimed.

[24] The Applicant is unsuccessful on all the issues. His application is dismissed.

Released: October 5, 2021

A handwritten signature in black ink, appearing to read 'Brian Norris', is written over a horizontal line.

Brian Norris, Adjudicator