



Citation: Ge v. Aviva General Insurance Company, 2022 ONLAT 19-008650/AABS

Licence Appeal Tribunal File Number: 19-008650/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:

Jun Hong Ge

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: E. Louise Logan

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Brendan Sheehan, Counsel

HEARD: By way of written submissions

REASONS FOR DECISION

BACKGROUND

- [1] The applicant, Jun Hong Ge, was involved in an automobile accident on May 25, 2017, and sought benefits from the respondent, Aviva General Insurance Company, pursuant to the Statutory Accident *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016) (the “Schedule”)*.¹
- [2] The applicant was denied certain benefits and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”). The parties participated in a case conference where they identified and agreed to the issues in dispute and consented to a videoconference hearing. The matter was later converted to a written hearing with the consent of the parties.

ISSUES

- [3] The following issues were identified as being in dispute at the case conference:
1. Is the applicant entitled to a non-earner benefit (“NEB”) in the amount of \$185.00 per week for the period June 22, 2017, to May 5, 2019?
 2. Is the applicant entitled to a medical benefit in the amount of \$3,044.70 for chiropractic treatment set out in a treatment plan/OCF-18 (“OCF-18”) dated September 20, 2017?
 3. Is the applicant entitled to a medical benefit in the amount of \$2,966.32 for chiropractic treatment set out in OCF-18 dated December 28, 2017?
 4. Is the applicant entitled to a medical benefit in the amount of \$3,363.61 for chiropractic treatment set out in an OCF-18 dated June 14, 2018?
 5. Is the applicant entitled to a medical benefit in the amount of \$3,981.88 for a psychological treatment set out in an OCF-18 dated June 13, 2019?
 6. Is the applicant entitled to a medical benefit in the amount of \$2,200.00 for a functional neurological assessment set out in an OCF-18 May 2, 2018?

¹ O. Reg. 34/10.

7. Is the applicant entitled to an award for unreasonably withheld or delayed payments pursuant to section 10 of Ontario Regulation 664?

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

[4] In his submissions, the applicant withdrew issues #2, 3, 4, and 5 above. Therefore, I address only issues #1, 6, 7 and 8 in my decision.

RESULT

[5] I find the applicant is not entitled to a non-earner benefit in the weekly amount of \$185.00, nor to a medical benefit in the amount of \$2,200.00. As there are no benefits payable, there is no basis upon which to consider a section 10 award and the applicant is not entitled to interest pursuant to section 51 of the *Schedule*.

ANALYSIS

[6] The applicant was involved in an accident when he was rear-ended by another driver. The applicant drove himself to the Scarborough Grace Hospital where he complained of neck and lower back pain resulting from the accident. The Disability Certificate (OCF-3) completed two days after the accident by Dr. Rick Tavares, chiropractor at Perfect Physio & Rehab, lists eighteen accident-related conditions, including neck and back soft tissue injuries, chronic post-traumatic headache, sleep disorders, dizziness, nausea and vomiting, phobic anxiety disorders, emotional shock and distress, nightmares, nervousness, and symptoms and signs involving an emotional state.

Non-Earner Benefits

[7] Pursuant to section 12 of the *Schedule*, to qualify for an NEB, the applicant must suffer a complete inability to carry on a normal life as a result of and within 104 weeks of the accident. According to *Heath v. Economical Mutual Insurance Company*,² the test for an NEB involves a comparison of the applicant's pre-accident activities and life circumstances versus his post-accident activities and circumstances. The applicant must demonstrate that his circumstances have changed enough to continuously prevent him from engaging in substantially all the activities he engaged in before the accident.

[8] I find that the applicant has not demonstrated, on a balance of probabilities, that he suffers a complete inability to carry on a normal life for the following reasons.

² *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391.

The applicant's claim for an NEB is based on his reported inability to carry out his housekeeping, recreational, schooling, home maintenance and personal care tasks. The OCF-3 indicates the applicant was unable to perform pre-accident responsibilities, activities of daily living, or work-related or home responsibilities without exacerbating his symptomology. The applicant was not working at the time of the accident. He submits that before the accident he was fully independent with personal care and housekeeping tasks. He would play basketball three to four times a month and work out in the gym two to three times a week, along with playing videogames. As a result of the accident, he reports he has difficulty with housekeeping tasks including cleaning the bathroom, heavy cooking, bed making, grocery shopping and garbage removal. He also reports a decrease in social relationships, and an inability to return to basketball and to play high graphic videogames. He submits he briefly stopped his schooling at Centennial College due to his ongoing impairments.

[9] Since the accident, the applicant has had a series of family physicians including Dr. Annisa Chang, Dr. Christopher Tan, and Dr. Wenli Zhang. In support of his application for an NEB, he cites the medical records of Dr. Zhang dated July 26, 2017, which indicate he reported headaches, dizziness, tinnitus, pain around his eyes, along with neck and back pain as a result of the accident. Dr. Zhang diagnosed a concussion.³ In subsequent visits to Dr. Zhang, the applicant also reported difficulty falling and remaining asleep, concentrating, nightmares, travel anxiety, mood changes, anxiety, and dizziness as a result of the accident.⁴ The applicant submits these accident-related conditions prevent him from engaging in his pre-accident activities.

[10] The applicant has not provided evidence of his pre-accident activities of normal life that can be compared to his post-accident activities. There is no evidence that speaks to the applicant's pre-accident lifestyle, except for his own statements. The applicant submits he briefly stopped schooling for Centennial College as a result of his accident, but has not provided any direct evidence, such as school records, in support of these statements. I find that even if he did provide such evidence, he started attending college after the accident, not before. This is based on his own statement in July 2017 to Robert Campos,

³ Clinical Notes and Records from Dr. Wenli Zhang, Tab 3 (Part 1) of the Applicant's Submissions.

⁴ Clinical Notes and Records from Dr. Wenli Zhang, Tab 3 (Parts 2 and 3) of the Applicant's Submissions.

occupational therapist, that he was able to start and attend school full-time during the period for which he claims entitlement to an NEB.⁵

[11] The applicant cites the Multidisciplinary IE Report dated August 16, 2017, in support of his claim. I find, however, that this Report is not supportive of the applicant's claim for an NEB. The IE assessors concluded that the applicant does not suffer a complete inability to carry on a normal life as a result of the accident. The applicant provided inconsistent reports of his post-accident restrictions to the IE assessors. He reported to Dr. Hamdi Benfayed, orthopaedic surgeon, that he had not returned to any leisure activities and was only able to make coffee and do laundry.⁶ He reported to Robert Campos that he does the laundry, light dishwashing, grocery shopping carrying light bags, and cooking with some difficulty. He reported he was able to watch videos, and socialize with friends, but not as often as before.⁷ The applicant reported to Dr. Sherri MacKay, psychologist, that he was able to complete all the household chores but had stopped doing so in protest as his wife was not assisting him in the tasks. He reported he no longer plays basketball and that playing video games makes him dizzy. He reported being independent with self-care except for difficulty donning a jacket and putting on socks. He reported eating at restaurants with his wife, cooking, seeing his friends most weeks, taking care of his puppy by walking him and cleaning out his crate, and spending time watching movies and videos. He reported driving to restaurants and to do errands most days.⁸

[12] In sum, the evidence does not support the applicant's claim that his accident-related injuries continuously prevent him from engaging in substantially all his pre-accident activities. The clinical notes and records from Dr. Zhang do not include information about the impact of the applicant's accident-related injuries on his ability to carry on a normal life. The IE assessors, upon whom the applicant relies in his submissions, concluded that the applicant does not suffer a complete inability to carry on a normal life as a result of the accident. In addition, there is no evidence, such as an affidavit or testimony, that speaks to the applicant's pre-accident activities. The applicant had the opportunity to provide such testimony at a videoconference hearing but brought a Motion to the Tribunal asking to proceed by way of written hearing, which was granted. The applicant has provided inconsistent accounts of his post-accident functional deficits,

⁵ Multidisciplinary Assessment Report of Dr. Hamdi Benfayed, orthopaedic surgeon, Dr. Sherri MacKay, psychologist and Robert Campos, occupational therapist, dated August 16, 2017, Tab 15 of the Applicant's Submissions.

⁶ Multidisciplinary Assessment Report dated August 16, 2017 at page 3, Tab 15 of the Applicant's Submissions.

⁷ *Ibid.*, at page 23.

⁸ *Ibid.*, at page 13.

including his ability to do housework and home maintenance, personal care, attend school, and socialize. In addition, the accounts he has provided do not rise to the level that indicate accident-related impairments continuously prevent him from engaging in substantially all his pre-accident activities. For the reasons outlined above, I find the applicant is not entitled to an NEB for the period in dispute.

Functional Neurological (Concussion) Assessment

- [13] I also find that the applicant has not met his burden to demonstrate that, on a balance of probabilities, the concussion assessment recommended in the OCF-18 is reasonable and necessary. Pursuant to section 15 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree, and that the overall costs of achieving them are reasonable.
- [14] In determining whether the recommended assessment is reasonable and necessary, I note that assessments, by their nature, are speculative. The purpose of an assessment is to determine if a condition exists. Notwithstanding their speculative nature, the applicant still bears the onus of establishing on a balance of probabilities that an assessment is reasonable and necessary. To do so, he must point to objective evidence that there are grounds for seeking the assessment.
- [15] The applicant submits he consulted Dr. James Fung, chiropractor at Somatic Assessments & Treatment Clinic in May 2018 due to ongoing symptoms and signs of concussion. On May 5, 2018, an OCF-18 was submitted by Dr. Fung for a concussion assessment. In support of his position that the OCF-18 is reasonable and necessary, the applicant relies on the fact Dr. Zhang had previously diagnosed a concussion and had referred the applicant to a neurologist and optometrist to investigate his concussion-like symptoms. The applicant also relies on the medical records that indicate the applicant reported ongoing concussions symptoms and injury to his lumbar spine, as a result of the accident.
- [16] The respondent submits the applicant has failed to demonstrate the proposed assessment is reasonable and necessary. The respondent argues there is no evidence the applicant sustained a head injury and concussion as a result of the accident. It submits the hospital records and Dr. Chang's records immediately post-accident do not mention a head injury. The respondent submits that Dr. Zhang subsequently made a diagnosis without any explanation. The respondent

further argues the OHIP summary shows the applicant attended a neurological consultation on August 23, 2017, with Dr. Maurice Levitan.⁹ The clinical notes and records of this consultation were not provided by the applicant, and the respondent argues a negative inference should be drawn from the applicant failing to produce these records. The respondent submits the recommended concussion assessment would be duplicative of the OHIP-funded neurological assessment by Dr. Levitan. Lastly, the respondent submits that Dr. Adit Margaliot, neurologist, did not diagnose a concussion during his IE assessment.¹⁰

- [17] In his submissions, the applicant does not reference the visit to Dr. Levitan nor indicate why the results of Dr. Levitan's assessment were not provided to the respondent, or the Tribunal. The applicant did not make any reply submissions, so he did not address the respondent's argument that a negative inference should be drawn from the failure to produce this evidence.
- [18] Upon review, I agree with the applicant that there is evidence of a concussion diagnosis by Dr. Zhang, and evidence of concussion-like symptoms that could provide grounds for seeking a concussion assessment. I find, however, that the applicant has already undergone an OHIP-funded neurological assessment related to his concussion symptoms with Dr. Levitan on August 23, 2017. The applicant has not produced the records of this assessment, although there is one reference in the clinical notes and records of Dr. Zhang on September 19, 2017. This note states "head concussion, consulted neurologist, no recall or specific recommendation".¹¹ The applicant does not refer to Dr. Levitan's assessment in his submissions or address the question of why a second concussion assessment is reasonable and necessary. The IE Report of Dr. Margaliot considered the applicant's reporting of concussion-like symptoms. Dr. Margaliot opined that given the inconsistencies in the applicant's reporting of symptoms and documented propensity to over-report somatic, cognitive, and psychological symptoms, it cannot be concluded reliably that the claimant has post-concussive syndrome.¹²
- [19] Ultimately, I find that the applicant cannot rely on the referral by Dr. Zhang to a neurologist in support of his position that a concussion assessment is reasonable and necessary without addressing the fact the applicant saw Dr. Levitan,

⁹ Decoded OHIP Summary from April 1, 2014 to January 16, 2020, Tab 5 of the Respondent's Submissions.

¹⁰ Neurology IE Report of Dr. Adit Margaliot, dated December 13, 2017, Tab 9 of the Respondent's Submissions; and Neurology IE Addendum Report dated September 12, 2018, Tab 10 of the Respondent's Submissions.

¹¹ Clinical Notes and Records of Dr. Wenli Zhang, Tab 3 (Part 2) of the Applicant's Submissions.

¹² Neurology IE Report, dated December 13, 2017, Tab 9 of the Respondent's Submissions.

neurologist, on August 23, 2017, and without producing the results of the concussion assessment with Dr. Levitan. I draw a negative inference from the failure to provide this assessment. I agree with the respondent that the applicant has not met his burden to demonstrate that, on a balance of probabilities, the second concussion assessment recommended in the OCF-18 is reasonable and necessary.

Award

[20] Pursuant to section 10 of Regulation 664, the applicant may be entitled to an award if I determine that the respondent unreasonably withheld or delayed payment of a benefit. I find the applicant is not entitled to an award because there is no evidence showing the respondent unreasonably withheld payment of benefits.

Interest

[21] No interest is payable pursuant to section 51 of the *Schedule* because no payments were overdue.

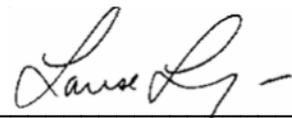
CONCLUSION

[22] For the reasons outlined above I find that the applicant is not entitled to the following:

1. a non-earner benefit in the weekly amount of \$185.00;
2. a medical benefit in the amount of \$2,200.00 for a concussion assessment;
3. a section 10 award; or
4. interest pursuant to section 51 of the *Schedule*.

[23] This application is dismissed.

Released: December 16, 2022



**E. Louise Logan
Vice-Chair**