



**Citation: Dahi v. Certas Home and Auto Insurance Company, 2023 ONLAT
21-010975/AABS - A**

Licence Appeal Tribunal File Number: 21-010975/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:

Yurak Dahi

Applicant

and

Certas Home and Auto Insurance Company

Respondent

AMENDED DECISION

ADJUDICATOR: Harry Adamidis

APPEARANCES:

For the Applicant: Yurak Dahi, Applicant
Mark Stoiko, Counsel
Georgiana Masgras, Counsel

For the Respondent: Gail Callaghan, Claims Advisor
Brian Yung, Counsel
Joshua Edmunds, Counsel

Court Reporter: Prashath Thambipillai

LAT Observers: Gareth Neilson, Member
Jeremy Roberts, Member
Kevin Yarde, Member

HEARD: by Teleconference: February 21-24 and 27, 2023

OVERVIEW

- [1] Yurak Dahi, the applicant, was involved in an automobile accident on January 29, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “Schedule”). The applicant was denied benefits by the respondent, Certas, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

PRELIMINARY ISSUES

- [2] The respondent filed a motion to strike the issue of entitlement to a catastrophic (CAT) assessment from this proceeding. The respondent argues the Tribunal previously determined, in its decision reported at 2020 CanLII 37594, that the applicant is not entitled to a CAT assessment and the applicant is now re-litigating the same issue with the same parties. *Res judicata* applies and the applicant cannot have the same issue adjudicated again.
- [3] The applicant submits that the respondent issued a new denial for a new treatment plan and therefore *res judicata* does not apply.
- [4] I agree with the applicant.
- [5] The three-part test for *res judicata* is well-established: the same question must have been decided, the decision at issue was final, and the parties to the decision are the same: see *Toronto v. CUPE Local 79*, 2003 SCC 63 at para. 23. Where *res judicata* is found, it may still be waived where the first proceeding was tainted by fraud or dishonesty, where there is fresh, new evidence that was previously unavailable and would conclusively impeach the first result, or where fairness dictates that the first result should not be binding: *CUPE Local 79*, at para. 52.
- [6] The Tribunal previously assessed entitlement to a CAT assessment in the amount of \$26,400 recommended by Novo Medical Services. There is no doubt that this decision was final.
- [7] The parties to that previous decision are the same here. However, the issue to be decided is different. The current treatment plan in dispute is a CAT assessment in the amount of \$13,440.00 recommended by Meditecs Independent Medical Examinations.
- [8] These are two different treatment plans. Bringing forward the same type of issue does not constitute *res judicata*. Two different denials were issued on two different benefit claims. For this reason, I find that the denied treatment plan for a CAT

assessment in the amount of \$13,440.00 recommended by Meditecs Independent Medical Examinations is properly before the Tribunal.

- [9] The respondent also sought to strike the applicant's claim for a special award on the ground that it had not been provided particulars of the award. Upon reviewing the case conference order, I noted that the applicant withdrew this issue at the case conference. The applicant agrees that this issue was withdrawn and that she would not be seeking an award.
- [10] The applicant also filed a motion seeking to admit late disclosure into evidence and to exclude the respondent's surveillance report.
- [11] Regarding the late disclosure, the applicant submits that the documents are relevant and diligent efforts were made to obtain the documents. Unfortunately, the third parties did not provide these documents in a timely fashion. Counsel for the applicant also advised that the clinical notes and records from the walk-in clinic were very recently brought to his attention by the applicant. For these reasons, the applicant should be allowed to enter these relevant documents into evidence despite their lateness.
- [12] The respondent did not object to the late disclosure, except for the clinical notes and records of the walk-in clinic. It submitted that it was too late to call a witness, and therefore, the respondent's ability to test this evidence is prejudiced.
- [13] The late disclosure consists of medical records and is relevant. I also agree that there is no clear indication that the applicant did not make reasonable efforts to obtain the late disclosure. As well, the respondent is only objecting to the records of the walk-in clinic.
- [14] Consequently, I admitted the late disclosure into evidence, including the clinical notes and records of the walk-in clinic. In my view, the prejudicial impact on the respondent is minimal and can be reasonable offset with questioning to the applicant.
- [15] Regarding the exclusion of the respondent's surveillance evidence, the principal issue raised by the applicant is that the investigator is not being called as a witness and this impacts the applicant's ability to test the investigator's report. The respondent subsequently indicated that the investigator is being called to testify. This resolves the main issue raised by the applicant. The relevance of the surveillance evidence is not in dispute. Consequently, the applicant's motion to exclude the surveillance evidence is dismissed.

Motion

- [16] The applicant submitted an OCF-19 dated April 23, 2021 to the respondent seeking a CAT determination under Criterion 7. The respondent found that the applicant's injuries do not meet the criteria for a CAT impairment under Criterion 7.
- [17] Attached to the OCF-19 was an independent psychiatric evaluation by Dr. Parekh, a psychiatrist. He determined that the applicant has a marked impairment in adaptation and found her to be catastrophically impaired based on the legislation in place at the time the accident took place in 2015.
- [18] Both the applicant and the respondent seemed to have missed Dr. Parekh's finding.
- [19] The applicant, on or about the time of the hearing, amended the OCF-19 to show that the applicant is now seeking a catastrophic determination under Criterion 8. The amended OCF-19 was served on the respondent and filed with the Tribunal. The applicant seeks to add this issue to this proceeding. They submit that the respondent failed to properly assess the OCF-19 and that the applicant should not be penalized for the respondent's mistake.
- [20] The respondent submits that they have been taken by surprise. They were not expecting to deal with Criterion 8. Adding the issue in the middle of the proceeding is highly prejudicial. Moreover, the respondent has not issued a denial based on Criterion 8. It is improper to bring an issue to the Tribunal without a denial.
- [21] I agree with the respondent. The amended OCF-19 was just served on the respondent. They have had no time to consider Criterion 8, and there is no denial. The Tribunal obtains its jurisdiction to resolve "disputes" in respect of an insured person's entitlement to benefits or the amounts thereof, pursuant to s. 280 of the *Insurance Act*. Without a denial, there is no dispute and without a dispute, the Tribunal has no jurisdiction to adjudicate the issue of whether the applicant is CAT impaired under Criterion 8.

ISSUES

- [22] The issues in dispute are:
 - i. Has the applicant sustained a catastrophic impairment as defined by the *Schedule*?

- ii. Is the applicant entitled to a CAT assessment, in the amount of \$13,440.00, recommended by Meditecs Independent Medical Examinations, in a treatment plan (OCF-18) submitted on April 25, 2021, denied May 8, 2021?
- iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [23] The applicant is not catastrophically impaired.
- [24] She is not entitled to the CAT assessment and she is not entitled to interest.

ANALYSIS

Has the applicant sustained a catastrophic impairment?

- [25] The applicant is not catastrophically impaired under Criterion 7. Her musculoskeletal impairments are due to degenerative changes and not the accident.
- [26] An insured person is catastrophically impaired under Criterion 7 when an accident causes them an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition (the Guides), results in a 55% or more whole person impairment (WPI) rating.
- [27] The motor vehicle accident (MVA) occurred on January 29, 2015. The applicant was driving behind a vehicle that stopped suddenly. She was unable to avoid the collision. She was taken by ambulance to Grand River Hospital. Imaging of her cervical spine, lumbar spine, pelvis, and left shoulder do not reveal any injuries.
- [28] The clinical notes and records of Dr. Renee Beland, the applicant's family doctor, document ongoing post-accident complaints of neck pain.
- [29] The applicant was referred to Dr. Eric Marmor, a neurosurgeon. He conducted a physical examination of the applicant and reviewed imaging of her cervical and lumbar spine. His letter dated November 16, 2015 shows that he was aware of the applicant's motor vehicle accident and her ongoing pain complaints. He states that the imaging revealed mild degenerative changes without any significant pressure on the spinal cord, thecal sac, or exiting nerve roots. The physical exam did not reveal any neurological issues. Dr. Marmor also opines that the pain complaints would likely resolve over time.

- [30] Dr. Marmor conducted a second physical examination three years later. In his letter dated October 12, 2018, he opines that her MRI report indicates a progression of her degenerative condition.
- [31] He reviews the MRI images one month later and sees significant spinal cord compression. He recommends surgical decompression. The surgery took place on December 4, 2018.
- [32] He examines the applicant on August 25, 2019 and diagnoses her with moderate degenerative disc disease.
- [33] Dr. Joseph Kwok, an orthopedic surgeon, completed a Catastrophic Impairment Report for the applicant. He opines that the applicant developed spinal stenosis with significant neurological compression as a result of the accident. In particular, he attributes her cervical spine impairment to the accident. He also attributes her neck, shoulder, and back pain to the accident.
- [34] Dr. Kwok's report does not explain how he concludes that the applicant's musculoskeletal issues developed from the accident. In testimony, Dr. Kwok explained that the applicant did not have neck or back pain before the accident. After the accident, she had neck and back pain. Therefore, he concludes, these pain issues must have been caused by the accident.
- [35] Dr. Greg Jaroszynski, an orthopedic surgeon, examined the applicant on October 7, 2019 for an insurer's examination. He opined that the applicant sustained sprain and strain injuries to her spine from the accident. Her condition significantly worsened in 2018 due to degenerative spinal stenosis. This worsening condition led to her having decompressive surgery. He further opined that the change in her spine is degenerative and not caused by the accident.
- [36] In testimony, Dr. Jaroszynski explained that there is no evidence of trauma in the imaging of the applicant's spine taken on February 14, 2015, about two weeks after the accident. He further explained that the vast majority of spinal stenosis cases, the condition that necessitated the applicant's surgery, are caused by degenerative changes in the spine. In his view, the applicant's current physical impairments are caused by degenerative changes to the applicant's spine and the effect of her surgery. There is no causal link to the accident.
- [37] I prefer the findings of Dr. Jaroszynski over the findings of Dr. Kwok. There is no imaging that shows trauma to the spine. This is inconsistent with Dr. Kwok's finding that the spine was injured in the accident. Degenerative changes are visible in the imaging. Dr. Kwok provides no explanation on why the accident is more likely to

have caused the applicant's impairments than the clearly documented degenerative changes. On balance, the opinion of Dr. Jaroszynski, that the applicant's musculoskeletal impairments were caused by degenerative changes, is more persuasive.

- [38] It is also noteworthy that in 2017, two years after the accident, the applicant obtained a diploma for a Developmental Service Worker Program. She also successfully completed a four-month placement and was working 20 hours per week as a Developmental Service Worker. As such, her physical impairments did not prevent her from working.
- [39] Her employment ended sometime in 2018, before her surgery. Her physical impairments increased significantly after the surgery, and she is now receiving income support from the Ontario Disability Support Program. This sequence of events is consistent with Dr. Jaroszynski's testimony that gradual, degenerative changes to the applicant's spine and the effect of her surgery are the cause of her physical impairments.
- [40] There is no doubt that the applicant has physical impairments that developed after the MVA. However, there is not enough evidence to show, on a balance of probabilities, that these impairments were caused by the MVA. For these reasons, I find that the applicant's physical impairments were not caused by the accident.
- [41] Dr. Kwok combined the applicant's 30% rating for mental impairment with a 39% rating for physical impairment to come up with a 57% whole-person impairment rating.
- [42] I do not accept that the applicant's physical impairments were caused by the accident. Consequently, it is not possible for the applicant to reach the 55% whole-person impairment rating needed to be determined catastrophically impaired under Criterion 7. For this reason, I find that the applicant is not catastrophically impaired.

Is the applicant entitled to a CAT assessment?

- [43] I find that the applicant is not entitled to a CAT assessment because the evidence does not show that her musculoskeletal impairments are caused by the accident.
- [44] The respondent must pay the cost of all reasonable and necessary treatment of injuries sustained in the accident. This includes the cost of a CAT assessment.
- [45] A CAT determination is a legal determination of the applicant's level of impairment. In order for a CAT assessment to be reasonable and necessary, the evidence must

show that the accident has caused the applicant to be impaired to such a degree that a CAT finding is probable.

- [46] The applicant is relying on the evidence of her physical and mental impairments to be found catastrophically impaired under Criterion 7. In particular, she must show that her physical impairments were caused by the accident.
- [47] The applicant relies on the opinion of Dr. Kwok. However, as noted above, his opinion is not supported by imaging. He also does not explain why the degenerative changes to the applicant's spine, which are documented in the imaging, should not be found to be the cause of her physical impairments.
- [48] Imaging shows degenerative changes and the applicant's physical impairments significantly worsened after the 2018 surgery. I have found that, on a balance of probabilities, these two factors caused the applicant's physical impairments.
- [49] The applicant submits that the purpose of the Tribunal is to offer consumer protection that allows for people, like the applicant, to receive benefits. I certainly agree with this position. But I would also add that decisions must be supported by evidence. In this case, the applicant was certainly aware of the two factors noted in the previous paragraph when she proceeded with a catastrophic determination. However, she has not been able to provide persuasive evidence to demonstrate that her physical impairments were caused by the accident, as required by the *Schedule*.
- [50] The evidence does not establish that her physical impairments were caused by the accident. As such, it is not possible for her to be found catastrophically impaired under Criterion 7 or for her CAT assessment to be found reasonable and necessary. For this reason, I find that she is not entitled to a CAT assessment.

Is the applicant entitled to interest?

- [51] As no benefits are owing, the applicant is not entitled to interest.

ORDER

- [52] The applicant is not catastrophically impaired under Criterion 7.
- [53] She is not entitled to a CAT assessment or interest.

[54] This application is dismissed.

Released: April 20, 2023

Harry Adamidis
Adjudicator