Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Elisha v. Aviva Insurance Company, 2024 ONLAT 21-013676/AABS

Licence Appeal Tribunal File Number: 21-013676/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:

Nahrain Elisha

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Ludmilla Jarda**

APPEARANCES:

For the Applicant: Rania Hafez, Paralegal

For the Respondent: Matthew Owen, Counsel

HEARD: **By Written Submissions**

OVERVIEW

[1] Nahrain Elisha (the "applicant") was involved in an automobile accident on October 16, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by Aviva Insurance Company (the "respondent") and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

1. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 Minor Injury Guideline ("MIG") limit?
2. Is the applicant entitled to an income replacement benefit ("IRB") in the amount of $400.00 per week from September 23, 2020 to October 15, 2021?
3. Is the applicant entitled to $2,461.62 for aqua therapy treatment, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan/OCF-18 ("treatment plan") submitted September 20, 2021 and denied October 21, 2021?
4. Is the applicant entitled to $2,000.00 for a neurological assessment, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan submitted September 21, 2021 and denied October 21, 2021?
5. Is the applicant entitled to $1,293.80.00 for a functional abilities evaluation, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan submitted July 23, 2021 and denied August 5, 2021?
6. Is the applicant entitled to $1,050.56 for self-directed exercise, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan submitted August 23, 2021 and denied September 28, 2021?
7. Is the applicant entitled to $2,000.00 for an orthopaedic assessment, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan submitted August 23, 2021 and denied September 28, 2021?

8. Is the applicant entitled to $1,950.00 for a TMJ assessment, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan submitted September 21, 2021 and denied October 21, 2021?
9. Is the applicant entitled to $2,200.00 for a psychological assessment, proposed by Dr. Beth Crystal in a treatment plan submitted August 23, 2021 and denied September 7, 2021?
10. Is the applicant entitled to $2,974.56 for physiotherapy services, proposed by Medilifecare Inc.-Dr. David Huang in a treatment plan submitted September 22, 2020 and denied September 23, 2020?
11. Is the applicant entitled to $1,044.40 for physiotherapy services, proposed by Medilifecare Inc.-Dr. David Huang in a treatment plan submitted February 10, 2020 and denied September 23, 2020?
12. Is the applicant entitled to $199.67 ($1,299.67 less $1,100.00 approved) for physical therapy services, proposed by Medilifecare Inc.-Dr. David Huang in a treatment plan submitted January 22, 2020 and denied March 19, 2020?
13. Is the applicant entitled to $1,044.40 for a psychological assessment, proposed by MediAssess Evaluations-Dr. Peter Waxer in a treatment plan submitted January 29, 2020 and denied September 23, 2020?
14. Is the applicant entitled to $2,486.00 for a psychological assessment, proposed by MediAssess Evaluations in a treatment plan submitted February 18, 2020 and denied March 19, 2020?
15. Is the applicant entitled to $2,974.56 for chiropractic and massage treatment, proposed by Medilifecare Inc. in a treatment plan submitted March 2, 2020 and denied March 16, 2020?
16. Is the applicant entitled to $983.24 for chiropractic and massage treatment, proposed by Medilifecare Inc. in a treatment plan submitted February 10, 2020 and denied February 25, 2020?
17. Is the applicant entitled to $2,000.00 for a chronic pain assessment, proposed by 2430307 Ontario Ltd. in a treatment plan submitted October 22, 2021 and denied November 25, 2021?

18. Is the applicant entitled to $1,580.00 for a psychological assessment, proposed by Dr. Beth Crystal in a treatment plan submitted July 23, 2021 and denied November 18, 2021?

19. Is the applicant entitled to $2,641.62 for a chronic pain assessment, proposed by 2430307 Ontario Ltd.-Dr. Paul Bruni in a treatment plan submitted October 27, 2021 and denied November 9, 2021?

20. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[3] For the reasons that follow, I find that:

1. The applicant's injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

2. The applicant is not entitled to IRB.

3. It is unnecessary for me to consider the reasonable and necessary nature of the disputed treatment plans as they propose goods and services outside the MIG and the $3,500.00 funding limit.

4. The applicant is not entitled to interest.

5. The respondent is not liable to pay an award.

ANALYSIS

Minor Injury Guideline ("MIG")

[4] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured person sustains impairments that are predominantly a minor injury. Section 3(1) defines a "minor injury" as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury."

[5] An insured person may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical

evidence stating that the condition precludes recovery from their minor injury if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[6] The applicant claims that she suffers from the following injuries as a result of the accident: neck pain with neurological signs, chest pain, abdominal pain, temporomandibular ("TMJ") pain, injury of unspecified muscle and tendon of wrist and hand level, persistent headaches, persistent neck and shoulder pain, lower back pain, and body strains.

[7] The applicant submits that she should be removed from the MIG on the grounds that she suffers from chronic pain and from a psychological impairment as a result of the accident. The applicant relies on the clinical notes and records ("CNRs") of her family physicians, Dr. Kenneth Seaman and Dr. Vishal Modi as well as the CNRs of Southlake Regional Hospital.

[8] In response, the respondent submits that the applicant's accident-related injuries are soft tissue injuries that can be treated within the MIG, and that the applicant has failed to provide compelling medical evidence to support that she should be removed from the MIG.

[9] The respondent relies on various insurer examination reports including a family medicine report dated September 22, 2020 completed by Dr. Sabrina Ming-Wai Tu, physician, a family medicine report dated September 27, 2021 completed by Dr. Maria Nesterenko, physician, a neurology report dated November 30, 2021 completed by Dr. Garry Moddel, neurologist, a psychology report dated September 22, 2020 completed by Dr. Cheryl Bradbury, psychologist, and a psychology report dated November 15, 2021 completed by Dr. Daniel Cohen, psychologist.

The applicant did not sustain injuries that warrant removal from the MIG

[10] I find that the applicant has failed to demonstrate, on a balance of probabilities, that she suffers from injuries that are not predominantly minor in nature as defined in the *Schedule*. Therefore, she remains within the MIG and its $3,500.00 limit on treatment.

Chronic Pain

[11] The applicant submits that she suffers from chronic pain and argues that she meets three out of six criteria outlined in the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 6th Edition (the "*Guides*"). The respondent denies that the applicant meets the criteria under the *Guides*.

[12] I find that the applicant has failed to demonstrate that she meets the test for chronic pain as outlined in the *Guides*. While the *Guides* are not a definitive test to determine if someone suffers from chronic pain, they provide a helpful tool in that they set fourth that a person must meet at least three out of six criteria to support a diagnosis of chronic pain. The applicant argues that she meets the following three criteria:

1. Criterion 2: Excessive dependence on health care providers, spouse, or family;

2. Criterion 4: Withdrawal from social milieu, including working, recreation, or other social contacts; and

3. Criterion 5: Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs.

[13] I agree with the respondent and find that there is insufficient evidence to support that the applicant meets these three criteria.

[14] With respect to criterion 2, while the applicant reported to Dr. Tu that she was not doing as much of the heavy chores such as carrying heavy bags and laundry due to her pain symptoms and that she was relying on her friend's family to help her with these chores, there is insufficient evidence to support that she was excessively dependant on her friend's family. Aside for the applicant's self-report, there is no evidence that she required assistance with her chores.

[15] With respect to criterion 4, while the applicant reported to Dr. Tu that as her symptoms worsened, she became more irritable, she quit working, and she has not worked since that time, there is no evidence to support that the applicant stopped working due to her accident-related injuries. Rather, following the accident, the applicant continued to work at her pre-accident employment for approximately 10 weeks, and according to the Record of Employment, the applicant was laid off in December 2019 due to a shortage of work. Further, while the applicant sought a medical note from Dr. Seaman on January 5, 2020 to take

some time off work, it is noteworthy that Dr. Seaman's diagnosis at the time was that the applicant suffered from a soft tissue injury.

[16] With respect to criterion 5, there is insufficient evidence to support that the applicant's delayed return to work was due to her accident-related injuries. As noted by the respondent, shortly after the applicant was laid off, the COVID-19 pandemic commenced which likely affected the applicant's return to work. The applicant returned to work on a full-time basis in July 2021 when she started working as a street sweeper driver.

[17] The applicant has not directed me to any evidence to support that she was unable to return to work due to her accident-related injuries. While the applicant reported to Dr. Modi that she was experiencing constant low back pain which was worse with prolonged sitting and standing as well as neck pain, which was unchanged since the accident, diagnostic imaging of her cervical and lumbar spines was unremarkable. Further, although the applicant was diagnosed with chronic lower back pain on October 16, 2021, it is unclear whether the clinical note belongs to Dr. Seaman or Dr. Modi as the clinical note is incomplete. Also, it is noteworthy that the clinical note identifies other potential causes for the applicant's back pain, including her weight. Moreover, there is no evidence that Dr. Seaman or Dr. Modi opined that the applicant was unable to return to work due to her pain complaints.

[18] I further find that the evidence supports that the applicant sustained soft tissue injuries within the definition of minor injury under s. 3 of the *Schedule*. Following the accident, the applicant was examined by Dr. Seaman on October 29, 2019 and complained of pain to her neck and back. Dr. Seaman diagnosed her with having suffered a whiplash injury and soft tissue injuries to her back. He recommended that she rest, apply heat, engage in moderate activity, and take anti-inflammatory and pain relief medication. Although the applicant complained of pain on several occasions following the accident, as indicated above, diagnostic imaging was unremarkable.

[19] Moreover, I accept the conclusion of Dr. Tu and Dr. Nesterenko that the applicant sustained minor injuries as defined by the *Schedule*. Dr. Tu concluded that the applicant likely suffered from a cervical strain and lumbar strain as a direct result of the subject accident, and she diagnosed the applicant with having sustained uncomplicated soft tissue injuries as a direct result of the accident. Similarly, Dr. Nesterenko diagnosed the applicant with a cervical sprain/strain (whiplash associated disorder I/II) and a thoracolumbar spine sprain/strain.

[20] Further, I accept Dr. Moddel's opinion that the applicant did not suffer from a neurological impairment as a result of the accident and that she can be treated within the MIG. Also, I note that the applicant did not make any submissions or direct the Tribunal to any evidence to support that she suffers from a neurological impairment as a result of the accident.

[21] Accordingly, I find that the applicant has not satisfied her onus to prove, on a balance of probabilities, that her injuries warrant removal from the MIG.

Psychological Impairment

[22] I find that there is no evidence to support that the applicant sustained a psychological impairment as a result of the accident. While the applicant alleges that she suffers from a psychological impairment, she does not identify any psychological impairments in her written hearing submissions. Further, she has not directed me to any medical evidence documenting any psychological complaints or impairments. As such, she has not met her evidentiary burden.

[23] Moreover, I accept the findings of Dr. Bradbury and Dr. Cohen that the applicant does not suffer from a psychological condition as a result of the accident. Dr. Bradbury indicated that on examination, the applicant did not present with any substantive psychological sequelae and concluded that the applicant did not meet full DSM-5 diagnostic criteria for any current major depressive disorder, any current manic or hypomanic episode, or any form post-traumatic stress disorder, psychological adjustment to injury disorder or clinical anxiety disorder as a result of the accident.

[24] Further, Dr. Cohen opined that there was sufficient reliable evidence to support that the applicant does not currently exhibit symptoms consistent with a loss or abnormality of psychological control. He did not find that the applicant's symptoms were psychologically impairing or met the DSM-5 diagnosable criteria for any mental disorder as a result of the accident.

[25] In light of all of the evidence, I find that the applicant has failed to meet her evidentiary burden to demonstrate on a balance of probabilities that her injuries fall outside the MIG.

Income Replacement Benefits ("IRB")

[26] To receive payment for pre-104-week IRB under s. 5(1) of the *Schedule*, the applicant must be 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. She must identify the essential tasks of her employment, which tasks she is unable to perform, and to what extent she is unable to perform them. The applicant bears the burden of proving, on a balance of probabilities, that she meets the test.

[27] Section 7(1) of the *Schedule* establishes that weekly IRB payments are calculated by using 70 per cent of the applicant's base amount less the total of all other income replacement assistance for the particular week the benefit is payable. Section 4(1) sets out that the base amount is the applicant's gross annual employment income divided by 52. Other income replacement assistance includes employment insurance ("EI") benefits. Also, in accordance with s. 7(3) of the *Schedule*, the respondent may deduct 70 per cent of any gross employment income from the weekly IRB payable to the applicant received during the period in which she is eligible to receive IRB.

[28] At the time of the accident, the applicant was 40 years old and was employed on a full-time basis as a night shift supervisor at Silani Sweet Cheese, a factory. Although the applicant returned to work following the accident, she stopped working on December 23, 2019, and she never return to her pre-accident employment.

[29] The applicant submits that she is entitled to IRB at the rate of $400.00 per week for the period of September 23, 2020 to October 15, 2021. The applicant relies on a clinical note dated January 5, 2023 authored by Dr. Modi.

[30] In response, the respondent denies that the applicant suffered from a substantial inability to perform the essential tasks of her pre-accident employment. The respondent notes that following the accident, the applicant returned to her pre-accident employment for 10 weeks until she was laid off in December 2019 due to a shortage of work. She then collected EI benefits as well as Canada Emergency Response Benefit ("CERB"), and when these benefits ran out, she returned to work. The respondent submits that the applicant has not met her onus to demonstrate entitlement to IRB.

The applicant is not entitled to IRB for the period of September 23, 2020 to October 15, 2021 at the rate of $400.00 per week

[31] I find that the applicant has not proven, on a balance of probabilities, that she is entitled to IRB for the period of September 23, 2020 to October 15, 2021 at the rate of $400.00 per week.

[32] The applicant submits that she was substantially unable to perform the essential tasks of her employment following the accident, and she seeks IRB for the period of September 23, 2020 to October 15, 2021. The respondent submits that the applicant failed to demonstrate that she suffered from a substantial inability to perform the essential task of her pre-accident employment.

[33] I agree with the respondent. There is insufficient evidence to support that the applicant suffered from a substantial inability to perform the essential tasks of her employment as required by s. 5(1) of the *Schedule*.

[34] I am not persuaded by the applicant's medical evidence and submissions that she was substantially unable to perform the essential tasks of her employment. While the applicant alleges that her neck and back pain prevented her from doing manual work, and she directs me to Dr. Modi's clinical note dated January 5, 2023, I find that no such note was included in the evidentiary record. However, in a clinical note dated January 5, 2020 authored by Dr. Seaman, it is noted that the applicant will take time off work to rest her injuries, and the applicant's injuries are described as soft tissue injuries. Further, Dr. Seaman did not identify the essential tasks of the applicant's pre-accident employment, which tasks she was unable to perform, and to what extent she was unable to perform them.

[35] The applicant has not directed me to any further evidence to support that she was unable to perform the essential tasks of her pre-accident employment as a result of her accident-related injuries. As such, I find that the applicant has not met her evidentiary burden to establish entitlement to IRB for the period of September 23, 2020 to October 15, 2021.

[36] Moreover, I find that the evidence does not support that the applicant was substantially unable to perform the essential tasks of her pre-accident employment. Although Dr. David Huang, chiropractor, noted in the Disability Certificate (OCF-3) dated February 20, 2020 that the applicant was substantially unable to perform the essential tasks of her employment at the time of the accident and within 104 weeks of the accident and that she could not return to work on modified hours and/or duties, I assign limited weight on this OCF-3 as there are no contemporaneous records to substantiate Dr. Huang's findings. Further, Dr. Huang did not identify the essential tasks of the applicant's pre-accident employment, which tasks she was unable to perform, and to what extent she was unable to perform them.

[37] Further, as indicated above, the applicant was laid off a few months prior to the commencement of the COVID-19 pandemic, and she collected EI benefits and CERB. The respondent submits that the COVID-19 pandemic was the likely

cause of the applicant’s delay in returning to work and that she waited until her benefits ran out before returning to work. As the applicant did not file any reply submissions, in the circumstances, I remain unpersuaded that the applicant did not return to work as a result of the accident.

[38] Correspondingly, I accept the opinions of Dr. Tu and Dr. Bradbury that from a musculoskeletal perspective and a psychological perspective, the applicant did not suffer a substantial inability to engage in the essential tasks of her pre-accident employment as a direct consequence of the accident.

[39] As such, the applicant did not demonstrate, on a balance of probabilities, that she is entitled to IRB for the period of September 23, 2020 to October 15, 2021.

Treatment Plans

[40] Having determined that the applicant remains within the MIG, it is unnecessary for me to consider the reasonable and necessary nature of the treatment plans in dispute as they propose goods and services outside the MIG and the $3,500.00 funding limit for a minor injury.

Interest

[41] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. Given that no benefits are overdue, no interest is payable.

Award

[42] Pursuant to s. 10 of Regulation 664, the respondent may be liable to pay an award if the Tribunal finds that it unreasonably withheld or delayed the payment of a benefit. As I have concluded that the applicant remains in the MIG, is not entitled to treatment outside the MIG, and is not entitled to IRB, it follows that no benefits were unreasonably withheld or delayed. Accordingly, the respondent is not liable to pay an award.

ORDER

[43] For the reasons outlined above, I find that:

1. The applicant’s injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

2. The applicant is not entitled to IRB.

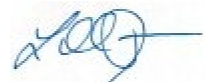
3. It is unnecessary for me to consider the reasonable and necessary nature of the disputed treatment plans as they propose goods and services outside the MIG and the $3,500.00 funding limit.

4. The applicant is not entitled to interest.

5. The respondent is not liable to pay an award.

[44] The application is dismissed.

Released: March 8, 2024



Ludmilla Jarda
Adjudicator