



Citation: Chen v. Aviva Insurance Company of Canada, 2024 ONLAT 22-013406/AABS

Licence Appeal Tribunal File Number: 22-013406/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:

Yi Chen

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Rachel Levitsky

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Tiziana Serpa, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Yi Chen, the applicant, was involved in an automobile accident on September 28, 2021, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, Aviva Insurance Company of Canada, 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:
- i. Is the applicant entitled to an income replacement benefit (“IRB”) in the amount of \$67.31 per week from January 7, 2022, to date and ongoing?
 - ii. Is the applicant entitled to \$4,703.90 for chiropractic services, proposed by Total Recovery Rehab Centre, in a treatment plan submitted April 28, 2022?
 - iii. Is the applicant entitled to \$1,047.06 (\$3,701.88 less \$2,654.82 approved) for psychological services, proposed by Somatic Assessments and Treatment Clinic, in a treatment plan submitted March 21, 2023?
 - iv. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
 - v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant is not entitled to an IRB, the treatment plans in dispute, interest, or an award. This application is dismissed.

ANALYSIS

Income Replacement Benefit

- [4] I find that the applicant is not entitled to an income replacement benefit.
- [5] To receive payment for an 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. The applicant must identify the essential tasks of their employment, which tasks they are unable to perform and to what extent they are unable to perform them. The applicant bears the burden of proving, on a balance of probabilities, that they meet the test.

- [6] Thereafter, to receive payment for a post-104-week IRB under s. 6 of the *Schedule*, the applicant must demonstrate on a balance of probabilities that they suffer from a complete inability to engage in any employment or self-employment for which they are reasonably suited by education, training or experience.
- [7] The applicant has provided very little evidence regarding his purported inability to work. He relies on the clinical notes and records of his family physician, Dr. Chongen Liu. At no point does Dr. Liu opine on the applicant's ability to work. The only reference to the applicant's employment status within Dr. Liu's records was a note on August 26, 2022, that said: "off work now". There are no details regarding why the applicant was not working, or what tasks he was unable to complete as a result of the accident.
- [8] The applicant also relies on the s. 25 report of Bruce Cook, psychological associate, dated March 26, 2022. Mr. Cook opined that the applicant experiences significant impairments in his activities of daily living, which significantly interfere with his return to full pre-accident functioning. However, Mr. Cook did not express any opinion with respect to the applicant's ability to return to work, nor did he detail what kinds of employment activities were impaired or to what extent. Without information as to how his employment activities have been impacted by his accident-related injuries, I find that Mr. Cook's report does not persuade me that the applicant meets either the pre- or post-104-week IRB tests.
- [9] The applicant also relies on an OCF-3 authored by Dr. Georgia Palantzas, chiropractor, on April 25, 2022. Dr. Palantzas checked a box indicating that the applicant suffered a complete inability to carry on a normal life, however the OCF-3 does not include further details regarding the specific tasks the applicant is unable to complete or why. I do not find a checked box to be compelling on its own without further information.
- [10] Further, the respondent submits that the applicant failed to comply with the Case Conference Report and Order of July 20, 2023 ("CCRO"), which required him to produce the clinical notes and records from Dr. Palantzas and her clinic, Total Recovery Rehab Centre, and requests that I draw an adverse inference as a result. The applicant declined to make any reply submissions or explain why

these documents were not provided. Given the lack of explanation, I choose to draw the adverse inference that the disclosure of these documents would be detrimental to the applicant's case.

- [11] The applicant made a number of submissions regarding the nature of his work without providing supporting evidence, and in some cases the evidence contradicts his claims. He states that he was working "as a manager in a bar and server of a karaoke bar and was self-employed". It is not clear to me whether these were separate jobs or the same job, as he has not provided a copy of his resume, any employment files, or any business records from his self-employment. He submits that he was working long hours prior to the accident, however he has not provided evidence indicating how many hours he worked. He submits that he has made genuine efforts to return to work without providing any evidence in that regard. He submits that he has not received any higher education that would enable him to engage in sedentary work, however there is evidence before me that he obtained a degree in business from the University of Toronto. Submissions are not evidence, and I find that the applicant has failed to provide sufficient evidence of his pre-accident employment activities or his education, training, or experience.
- [12] The respondent relies on the s. 44 reports of Dr. Shafik Dharamshi, physiatrist, and Dr. Godwin Lau, psychologist, dated July 22, 2022. Dr. Dharamshi opined that the applicant is able to perform all of his pre-accident essential tasks of employment with appropriate pacing and techniques, and without restrictions or modifications. He explained that, from a musculoskeletal perspective, the applicant did not suffer a substantial inability to perform the essential tasks of his employment. Dr. Lau opined that, from a psychological perspective, the applicant did not suffer a substantial inability to perform the essential tasks of his pre-accident employment. He indicated that the applicant was able to look after his self-care tasks, he was fine with walking, sitting, and standing, he could carry light items, and he was still helping his wife with groceries, cooking, and laundry. I note that the applicant did not mention or take issue with Dr. Dharamshi or Dr. Lau's reports in his submissions and has therefore given me no reason to discount them.
- [13] For all of the reasons above, I find that the applicant has not met his burden of proving, on a balance of probabilities, that he suffered a substantial inability to perform the essential tasks of his employment within 104-weeks after the accident, or that he suffers from a complete inability to engage in any

employment or self-employment for which he is reasonably suited by education, training, or experience. I accordingly find that he is not entitled to an IRB.

Chiropractic Treatment Plan

- [14] I find that the applicant is not entitled to this treatment plan.
- [15] To receive payment for a treatment and assessment plan under s. 15 and 16 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.
- [16] The treatment plan in dispute proposes a re-assessment with Dr. Palantzas, 16 sessions of chiropractic treatment, 16 sessions of exercise/strength and balance training, 16 sessions of acupuncture, a progress report, and transportation to and from treatment sessions. I note that the applicant has not provided a copy of the entire treatment plan, only the list of proposed services, and has not provided an explanation as to what the goals of the treatment are or how the goals will be met.
- [17] The applicant submits that he continued to complain of pain to Dr. Liu and Mr. Cook, and that the treatment plan should be approved to assist with his recovery as he has not achieved his pre-accident state. Dr. Liu recommended physiotherapy on March 21, 2023, but not before that date. Dr. Liu's recommendation came almost one year after the treatment plan was submitted. He did not comment on the amount of treatment proposed in this plan, nor did he recommend chiropractic treatment, exercise, or acupuncture. Mr. Cook is a psychological associate and did not make physical treatment recommendations. Treatment plans on their own are not compelling evidence in support of proposed treatment. They must be accompanied by compelling contemporaneous medical evidence, which I find the applicant has not provided.
- [18] Further, the applicant has not explained why he required transportation to and from the clinic, especially when he advised Mr. Cook that he was able to drive and was not avoiding this activity.
- [19] As indicated above, the applicant has failed to produce records from Total Recovery Rehab Centre in accordance with the CCRO, and I have drawn an adverse inference as a result. In any event, the applicant bears the burden of

proving that the treatment plan is reasonable and necessary. The respondent has approved \$6,115.50 in physical treatment to date, however the applicant has not provided compelling evidence of whether he attended this treatment, or whether this treatment was effective and to what extent.

- [20] Finally, Dr. Dharamshi opined in a report dated July 22, 2022, that the treatment plan in dispute was not reasonable and necessary as the applicant had attained maximum medical improvement and recovery from his injuries. Again, the applicant has not made any submissions regarding Dr. Dharamshi's report and I have not been provided any reason to discount his opinion.
- [21] I accordingly find that the applicant has not proven, on a balance of probabilities, that this treatment plan is reasonable and necessary.

Psychological Services Treatment Plan

- [22] I find that the applicant is not entitled to the amount in dispute with respect to this treatment plan.
- [23] The treatment plan proposed 14 sessions of therapy with a psychotherapist, at \$224.42 per 1.5 hour session (an hourly rate of \$149.61). The respondent approved 14 sessions at \$149.63 for each 1.5 hour session (an hourly rate of \$99.75).
- [24] The applicant did not make any submissions with respect to the amount in dispute or the hourly rate of the treatment provider. Without any submissions or evidence in this regard, I find that he has not met his burden in proving that the amount in dispute with respect to this treatment plan is reasonable and necessary.

Interest

- [25] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. As I have found that no benefits are overdue, the applicant is not entitled to interest.

Award

- [26] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. As I have found that no benefits are payable, the applicant is not entitled to an award.

ORDER

[27] The applicant is not entitled to an IRB, the treatment plans in dispute, interest, or an award. This application is dismissed.

Released: December 5, 2024

Rachel Levitsky
Adjudicator