Citation: Williams v. Aviva General Insurance, 2025 ONLAT 23-003812/AABS

Licence Appeal Tribunal File Number: 23-003812/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:

Clive Williams

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: **Lisa Holland**

APPEARANCES:

For the Applicant: Rajiv Kapoor, Paralegal

For the Respondent: Tiziana Serpa, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Clive Williams, the applicant, was involved in an automobile accident on February 9, 2018, 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 General Insurance, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUES

[2] **Preliminary Issue**: The preliminary issue to be decided Is:

1. Is the applicant barred from proceeding to a hearing on the issue of whether his injuries fall under the Minor Injury Guideline ("MIG") by the doctrine of *res judicata*?

SUBSTANTIVE ISSUES

[3] The substantive issues in dispute are:

i. 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 limit and in the MIG? Note: The parties agree that $3,499.44 has been incurred as of the date of the case conference.

ii. Is the applicant entitled to $2,486.00 for a psychological assessment, proposed by the Centre for Psychological & Counselling Services in a treatment plan/OCF-18 ("plan") dated February 8, 2023?

iii. Is the applicant entitled to $4,302.98 for physiotherapy services, proposed by HealthMax Physiotherapy Scarborough in a plan dated February 8, 2023?

iv. Is the applicant entitled to $2,200.00 for a chronic pain assessment, proposed by Rehab Pain Management in a plan dated February 8, 2023?

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

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

RESULT

[4] On the preliminary issue, the applicant is in the MIG because the doctrine of *res judicata* applies.

[5] As the applicant was found to be within the MIG in the previous decision dated December 8, 2020, he is not entitled to the disputed treatment plans.

[6] The respondent's denial of the disputed plans dated February 8, 2023 were proper notice in accordance with s.38 (8) of the *Schedule*, and therefore, these plans are not payable pursuant to s.38(11) of the *Schedule*.

[7] The applicant is not entitled to an award, nor interest.

PROCEDURAL ISSUES

Page Limits Exceeded

[8] The respondent submits that the applicant has failed to abide by the submission page limits set out in the November 14, 2023 Case Conference Report and Order ("CCRO"). The CCRO indicates the applicant's and respondent's written submission will be limited to 15 pages in length.

[9] The applicant filed submissions of 14-pages in length, without double spacing between paragraphs, in addition to a title page, index and list of footnotes pursuant to the CCRO.

[10] In his reply, the applicant submits that the respondent also failed to abide by the formatting requirements set out in the CCRO, and never-the-less, the respondent has not shown any prejudice caused by the formatting of the applicant's hearing submissions.

[11] The respondent filed submissions of 14-pages in length, without double spacing between paragraphs and including footnotes, in addition to a title page and index.

[12] I disagree with the parties that the submissions they made did not comply with the requirements set out in the CCRO. The CCRO was clear that the page limit for submissions was 15 pages, which includes submissions being made on the evidence and case law. The title page, index and actual pages of evidence and case law referenced in the submissions and appended as documents are excluded from the page limit.

[13] The CCRO specified that the hearing adjudicator *may* not consider submissions which exceed page limits. I note that pursuant to ss. 23(1) and 25.0.1 of the *Statutory Powers Procedure Act*, it falls directly within my discretion to strike any submissions in excess of the 15-page limits set out in the CCRO. However, in this case, the parties did not exceed the 15-page limit and as such, I will admit their submissions. I also find there is no prejudice to either party.

[14] In an email correspondence to the Tribunal dated June 24, 2024, the respondent attempts to raise issues regarding the applicant serving updated clinical notes and records of his family physician outside the production deadline set in the CCRO, and the format of applicant's written hearing submissions, which has already been addressed. I find that these further matters are not properly before the Tribunal since the respondent has had its opportunity to raise these issues in its written hearing submissions. Further, I find that the respondent has not suffered any prejudice as a result of the late production of the updated records of the family physician.

ANALYSIS

Background

[15] The applicant was involved in an accident on February 9, 2018, and filed an application with the Tribunal file no. 19-008480/AABS. In a decision dated December 8, 2020, the Tribunal determined that the applicant remained within the Minor Injury Guideline ("MIG"), and that he was not entitled to the treatment plan for physiotherapy services, as the MIG limits had been exhausted. The applicant did not file a request for reconsideration of the decision or file an appeal.

[16] The applicant subsequently submitted additional treatment plans one day before the expiration of five years after the accident, which were denied by the respondent pursuant to s.20 of the *Schedule*. The applicant then applied to the Tribunal for resolution in the present case. This second application again seeks a determination that the applicant be removed from the MIG, and two new treatment plans, an award and interest.

[17] At the case conference held on November 3, 2023, the respondent raised the preliminary issue that the doctrine of *res judicata* applies to the current application regrading the issue of whether the applicant's injuries fall under the MIG.

Preliminary Issue: Res Judicata and Tribunal File 19-008480/AABS

[18] I find that the applicant is in the MIG because the doctrine of *res judicata* applies.

[19] The respondent submits the doctrine of *res judicata* applies to this application, as the Tribunal previously determined that the applicant suffered minor injuries as a result of this accident which were treatable within the limits of the MIG. As noted above, the applicant did not file a reconsideration of the decision or an appeal.

[20] The applicant submits that although *res judicata* applies to his claim for benefits beyond the MIG limit, he has provided substantial new medical evidence in support of his accident-related injuries to warrant removal from the MIG. In addition, the applicant submits that the previous decision was founded on uncontested arguments by the respondent regarding the applicant's injuries under the MIG.

[21] The doctrine of *res judicata* prevents a party from relitigating an issue that has already been decided. Four preconditions must be established before the adjudicator can determine whether to exercise discretion to apply the doctrine of *res judicata,* or more specifically issue estoppel, as set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 at para.25:*

i. that the same question has been decided;

ii. that the judicial decision which is said to create estoppel was final; and,

iii. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[22] I am satisfied that these preconditions have been met and that the doctrine of *res judicata* applies to this application. I find that the parties are the same as in the previous application. The claim was within the Tribunal's jurisdiction. The prior decision was made on the merits and found that the applicant suffered minor injuries and was within the treatment limits of the MIG. Although the applicant argues he has new medical evidence, I find that the issue of MIG has already been decided. The applicant has not sought a reconsideration or appeal of the 2020 decision.

[23] In sum, I am satisfied that the four factors set out in *Danyluk* are engaged. The parties are the same in both actions. The prior claim is within the Tribunal's jurisdiction. The 2022 decision was on the merits, and it was a final judgment.

[24] However, the applicant further argues that if it applies, res *judicata* should be waived in this instance. I will now turn to consideration of this argument.

Waiver of Res Judicata and new evidence

[25] I find that the applicant has not established that *res judicata* should be waived in this case. The applicant argues that if res judicata does apply, it should be waived, since fresh, new evidence, previously unavailable, conclusively impeaches the original result, and fairness dictates that the original result should not be binding in the new context.

[26] As set out in *Toronto (City) v. CUPE Local 79, 2003 SCC 63* at para. 52*, res judicata* can be waived in the following situations:

i. The first proceeding is tainted by fraud or dishonesty;

ii. Fresh, new, evidence is submitted that was previously unavailable that would conclusively impeach the original results; or

iii. When fairness dictates that the original result should not be binding in the new context.

[27] The applicant does not argue the first proceeding was tainted by fraud or dishonesty.

There is no fresh, new evidence

[28] I find there is no fresh, new evidence in this case.

[29] The applicant submits that the consultation report dated June 23, 2020, by Dr. Ross Roussev, neurologist, and the chronic pain consultation report dated August 25, 2020 by Dr. Ada Lyn Yao, pain specialist, constitute new evidence that would impeach the original result. The applicant also relies on the results of an MRI report dated March 24, 2020 regarding his pre-existing back condition. The applicant further relies on a pre-screen report dated February 6, 2023, by Dr. Mohammed El-Saidi, psychiatrist, and updated clinical notes and records ("CNRs") of his family physician, Dr. Yuriy Tatuch, from June 2, 2020 to December 19, 2023. The applicant argues that these records and reports demonstrate that his pre-existing condition of lumbar spondylitis has developed into left sided sciatica, chronic pain and psychological sequalae leading to functional impairments after the accident.

[30] The applicant also argues that in a pre-screen report dated February 6, 2023, Dr. Mohammed El-Saidi, psychiatrist, made a provisional diagnosis of adjustment disorder and specific phobia. The applicant does not refer to any notes from his treating physicians regarding a psychological impairment as a result of the accident. In fact, the CNRs of Dr. Arthur D. Shelley, his former family physician and Dr. Tatuch, make no mention of a psychological condition after the accident, and specifically, Dr. Tatuch notes on September 26, 2022 that the applicant does not have a depressed mood.

[31] The respondent submits that *res judicata* applies, as the applicant was already found to be within the treatment limits of the MIG in the previous decision and is not entitled to any additional treatment or assessment expenses. The respondent further submits that the applicant has not produced new evidence that was unavailable at the time of the previous decision in support of a pre-existing condition, chronic pain or psychological impairment to warrant his removal from the MIG. The respondent argues that although the applicant obtained reports after the date of the previous decision, he has not provided a reason why this new evidence was unavailable at the time of the previous decision.

[32] The respondent relies on the IE reports dated February 8, 2023, May 18, 2023 and November 24, 2023 by Dr. Ramunas Saplys, orthopaedic surgeon, and IE reports dated June 13, 2023 and December 18, 2023 by Dr. Arpita Biswas, psychologist. The respondent submits that Dr. Saplys indicates in his reports that the applicant returned to work after the accident, and he has resumed all his pre-accident activities of daily living. Dr. Saplys further indicates there has been no material change to the applicant's shoulder or back as a result of the accident. The respondent also submits that Dr. Biswas concluded that the applicant did not sustain a psychological impairment as a result of the accident, and he reported a subsequent accident in April 2023, which caused significant physical and psychological impairments.

[33] I find that the new evidence submitted by the applicant does not impeach the original results.

[34] I find that the MRI report dated March 24, 2020 is not fresh evidence that was previously unavailable that would warrant a rehearing of the issue. In the previous hearing, the applicant obtained a motion order dated July 8, 2020, for an extension of the deadline to exchange productions to July 17, 2020, and for rescheduling of the hearing to August 17, 2020, to allow time for the applicant to

file the MRI report and the CNRs of Dr. Shelley, who was the applicant's family physician at the time of the accident.

[35] I find that Dr. Roussev's report concludes that the MRI dated March 24, 2020 reveals age-related degenerative disc disease ("DDD"), and that further electrophysiological studies confirm the applicant has diabetic type polyneuropathy, both conditions of which are not accident-related. Contrary to the applicant's assertion that his pre-existing lumbar spondylitis became chronic after the accident, Dr. Roussev does not attribute the applicant's back symptoms to the accident. There was no follow-up with Dr. Roussev until November 14, 2023, after a subsequent accident on April 12, 2023, which raises causation concerns. In addition, the records indicate that the applicant had two nerve block procedures with Dr. Yao on October 9 and 17, 2020, with no effect or further treatment. Interestingly, there are no visits to Dr. Tatuch for back complaints from November 1, 2021 until April 14, 2023, after the applicant's subsequent accident.

[36] I am not satisfied that the additional reports of Dr. Roussev, Dr. Yao, Dr. Saidi or the updated CNRs of Dr. Tatuch are sufficient to represent new evidence that was previously unavailable and would conclusively impeach the original results to defeat *res judicata*. These documents do not adduce any evidence of a deterioration or change in the applicant's medical condition since the previous hearing. Given the foregoing, *res judicata* would operate to bar this evidence in relation to the MIG. Consequently, the applicant remains bound by the previous determination in Tribunal file 19-008480/AABS, and is subject to treatment within the MIG.

[37] I find that the applicant is barred by operation of the doctrine of *res judicata* from re-litigating the issue of whether his accident-related injuries fall under the MIG.

The applicant is not entitled to the treatment plans in dispute

[38] Since the applicant sustained a minor injury as a result of the accident, and the MIG limits are nearly exhausted, it is not necessary to determine whether the disputed treatment and assessment plans are reasonable and necessary.

[39] The applicant also makes arguments with respect to section 38 of the *Schedule*. I will now turn to these arguments.

Section 38(8) of the Schedule

[40] Section 38(8) of the *Schedule* provides that an insurer shall respond to a treatment and assessment plan within 10 business days of receiving it by

identifying the goods, services, assessments and examinations described in the plan that the insurer does and does not agree to pay for. The insurer must also provide medical and all other reasons why it has determined that the treatment and assessment plan is not reasonable and necessary.

[41] If an insurer fails to comply with s. 38(8), the *Schedule* sets out two consequences under s. 38(11). First, an insurer who fails to provide the insured with adequate notice of the reasons for its denial is prohibited by s. 38(11) 1 from taking the position that the insured person has an impairment to which the MIG applies. Second, s. 38(11)2 provides that if an insurer fails to provide proper notice of the reasons for its denial it must pay for all incurred goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives notice as described in s. 38(8). See: *Aviva General Insurance Company v. Catic*, 2022 ONSC 6000 (CanLII).

[42] The Tribunal has recognized medical reasons for denial as specific details about the insured's condition forming the basis for the insurer's decision or identifying information about the insured's condition that the insurer still requires. In addition, the insurer should refer to the specific benefit or determination at issue with the relevant section of the *Schedule*.

Sufficiency of the Respondent's Denial of plans for a psychological assessment, a chronic pain assessment and physical rehabilitation

[43] The applicant argues that the plan dated February 7, 2023 for a psychological assessment by Dr. Mohammed El-Saidi, in the amount of $2,486.00; and the plans dated February 8, 2023 for a chronic pain assessment by Dr. Nadir Al-Jazrawi, general practitioner, in the amount of $2,200.00; and dated February 8, 2023 for physical rehabilitation, in the amount of $4,302.98 by Dr. Venous Salehi, chiropractor, were improperly denied by the respondent. The respondent wrote to the applicant on February 9 and 17, 2023 denying the benefits, within 10 business days of receiving the plans on February 8, 2023.

[44] The applicant submits that the respondent's denial was generally improper because it did not provide medical reasons and particulars regarding this plan. I find that the February 9 and 17, 2023 denials were valid denial letters. The letter dated February 9, 2023 indicates that the applicant's claim was closed since May 18, 2021. The respondent identifies the three disputed plans from Center for Psychological and Counselling Services Inc., HealthMax Physiotherapy, and Rehab & Pain Management Inc. The respondent further states in both letters

that the applicant's claim for medical and rehabilitation and attendant care benefits is limited to five years from the accident, or February 9, 2023, unless the applicant sustained a catastrophic impairment as a result of the accident.

[45] I find that the respondent provides reasons for the denial to allow the applicant to make a decision whether or not to dispute his claims. The respondent identified the lack of activity on the applicant's file since it was closed on May 18, 2021, and the respondent states that the applicant has not sustained a catastrophic injury to warrant benefits beyond five years after the accident.

[46] Given that the respondent provided proper notice, I find that the applicant has not met his burden to establish entitlement to these plans and the consequences of s.38(11) are not applicable.

The notice of examination ("NOE") was sufficient

[47] I find that the respondent's NOE dated November 15, 2023 offered sufficient reasons for the addendum reports of Dr. Biswas and Dr. Saplys to determine whether the applicant's injuries warrant removal from the MIG and whether the disputed plans are reasonable and necessary.

[48] The applicant submits that the respondent's NOE dated November 15, 2023 failed to comply with s.44(5) of the *Schedule* because they did not identify medical and any other reasons for the applicant to attend the assessments. However, the notice states that the applicant is not required to attend the assessments, and the respondent received updated medical records for which they required addendum reports by Dr. Saplys and Dr. Biswas.

[49] According to s. 44(5) of the *Schedule*, the insurer is required to give the applicant a notice setting out the following:

a) The medical and any other reasons for the examination;

b) Whether the attendance of the insured person is required at the examination;

c) The name of the person or persons who will conduct the examination, any regulated health profession to which they belong and their titles and designations indicating their specialization, if any, in their professions, and;

d) If the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will

require more than one day, the same information for the subsequent days.

[50] The respondent submits that in its NOE dated November 15, 2023, the respondent advised the applicant that his attendance was not required, identified the name and specialty of the assessors, and the reason was to consider the updated medical documentation. The respondent further submits that it provided medical and other reasons in the NOE dated November 15, 2023 in compliance with s.36 of the *Schedule*.

[51] I find that the respondent provided sufficient medical and other reasons. In the NOE, the respondent referred to the applicant's updated medical information, and its intention to have addendum medical opinions to consider the updated information. I find that the respondent's reasons for the examinations were sufficient and specific to the applicant and complied with the requirements of s.44 of the *Schedule*.

Interest

[52] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* As there are no benefits owing and interest does not apply.

Award

[53] 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. Since no benefits are payable, an award under s.10 of Reg. 664 is not warranted.

ORDER

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

i. The doctrine of *res judicata* applies to this application regarding the issue of whether the applicant's injuries fall under the MIG. The Tribunal previously determined that the applicant's injuries are predominantly minor and therefore are subject to treatment within the MIG treatment limit;

ii. The applicant is not entitled to the treatment plans in dispute;

iii. Interest is not payable and an award does not apply, and;

iv. The application is dismissed.

Released: March 21, 2025

Lisa Holland
Adjudicator