Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2025 CanLII 23520 (ON LAT)

Citation: Yang v. Allstate Insurance Company of Canada, 2025 ONLAT 23-000957/AABS

Licence Appeal Tribunal File Number: 23-000957/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 Yang

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Yu Denise Jiang, Paralegal

For the Respondent: Jodie Therrien, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Yi Yang, (the “applicant”), was involved in an automobile accident on November 8, 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 Allstate Insurance Company of Canada (the “respondent”) and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

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ISSUES

[2] The issues in dispute are:

1. Is the applicant entitled to an income replacement benefit (“IRB”) in the amount of $357.93 per week from November 16, 2021 to date and ongoing?

2. Is the applicant entitled to the remaining balance of $926.63 ($4,736.71 less $3,810.08 approved) for transportation services and fees for documentation, support activity, proposed by Total Recovery Rehab Centre in a treatment plan/OCF-18 (“OCF-18”) dated November 10, 2021?

3. Is the applicant entitled to the remaining balance of $704.44 ($4,229.56 less $3,525.12 approved) for transportation services, proposed by Total Recovery Rehab Centre in a OCF-18 dated April 22, 2022?

4. Is the applicant entitled to the remaining balance of $733.82 ($4,543.90 less $3,810.08 approved) for transportation services, proposed by Total Recovery Rehab Centre in a OCF-18 dated August 3, 2022?

5. Is the applicant entitled to the remaining balance of $480.00 ($4,229.56 less $3,749.56 approved) for transportation services, proposed by Total Recovery Rehab Centre in a OCF-18 dated October 4, 2022?

6. Is the applicant entitled to $4,229.56 for physiotherapy services, proposed by Total Recovery Rehab Centre in a OCF-18 dated December 6, 2022?

7. Is the applicant entitled to $1,047.34 ($3,701.88 less $2,654.54 approved) for psychological services, proposed by Somatic Assessments & Treatment Clinic in a OCF-18 dated December 5, 2022?

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

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

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RESULT

[3] I find that:

i. The applicant is not entitled to IRB.

ii. The OCF-18 with a remaining balance of $1,047.34 has been fully approved by the respondent, and therefore is no longer in dispute for the purposes of this hearing.

iii. The applicant is not entitled to the OCF-18s in dispute, nor related interest under s. 51 of the *Schedule*.

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

PROCEDURAL ISSUES

The Applicant's Reply Submissions

[4] On May 30, 2024, the respondent filed a Notice of Motion requesting that the applicant's reply submissions be struck in their entirety. Alternatively, it seeks to have a study permit, issued on July 26, 2023 (Tab 1 of the applicant's reply submissions) excluded from the record. It argues that the applicant in her reply has produced new evidence which was not previously disclosed, made new arguments, and re-states arguments that have already been made in her initial submissions. As a result, it takes the position that the applicant is splitting her case and relies upon the leading case pertaining to the rule against splitting one's case of *R. v. Krause*, 1986 CanLII 39 (SCC), [1986] 2 S.C.R. 466 ("*Krause*").

[5] The applicant argues that her reply submissions are directly responding to arguments made by the respondent, did not raise new issues and the study permit is critical evidence.

[6] I deny the respondent's request to strike the entirely of the applicant's reply submissions and for the study permit to be excluded from the record. I find the applicant's reply to be proper and does not split her case.

[7] Specifically, I disagree with the respondent that paragraphs two and four are improper because she re-stated her arguments. These reply submissions pertained to the applicant's position that she had discharged her burden to prove entitlement to IRB and that the *Schedule* requires a Disability Certificate ("OCF-3") to show eligibility and IRB was never paid. Notably, the applicant did not make these arguments in her initial hearing submissions, and the respondent argued in its submissions that the applicant did not discharge her evidentiary onus for entitlement to IRB and was not eligible for IRB. Thus, I find that this was a proper reply as the applicant was responding to arguments raised by the respondent.

[8] I also find that the applicant's reply submissions at paragraph three was proper. I acknowledge the respondent's argument that the applicant did not disclose the study permit until her reply submissions, and therefore she is raising new arguments and evidence, which is contrary to *Krause*.

[9] I disagree. In *Krause*, it was determined that a plaintiff may be allowed to call evidence in rebuttal when the defence has raised some new matter or defence which he could not reasonably have anticipated (see para. 16). Here, the respondent argued in its submissions that as a visitor in Canada, the applicant was categorized as a temporary resident and not entitled to work in Canada. Significantly, the respondent has not directed me to evidence that supports that the applicant was aware that these issues would be raised in its defence. While it argues that the applicant was aware that her immigration status in Canada was a factor, it has not referred me to evidence to support such a proposition.

[10] The respondent further argues that it raised the issue of immigration in response to the applicant's initial submissions that she attempted to work, and therefore the issue was raised by the applicant and not by the respondent. I am not persuaded by this argument because the applicant never stated that she attempted to work in Canada in her initial submissions. Rather, she argued that she attempted to work after the accident but was unable to do so. Significantly, the applicant did not clarify whether this attempt was made in Canada or China.

[11] The respondent further argues that the applicant was non-compliant with the Case Conference Report and Order ("CCRO"), released on October 10, 2023 because she did not produce the study permit until her reply submissions.

[12] I disagree because the deadlines set out in the CCRO apply to evidence that the parties intended to rely upon. However, the applicant produced the study permit to rebut the respondent's initial submissions, therefore she did not intend to rely upon the study permit at the time of her initial submissions. Therefore, as I have

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determined that the reply submissions were proper and the deadlines outlined in the CCRO are not applicable to the study permit, then it follows that the study permit will not be excluded from the record.

[13] In short, I deny the respondent’s request.

ANALYSIS

The applicant is not entitled to pre-104 IRB

[14] I find that the applicant has not established on a balance of probabilities that she suffers a substantial inability to perform the essential tasks in her pre-accident employment as an accountant.

[15] Entitlement to pre-104 IRB is set out in section 5 of the *Schedule*. Section 5(1)1ii provides that the benefit is payable if the insured person was employed at least 26 weeks during the 52 weeks before the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.

[16] The applicant argues that the *Schedule* requires an OCF-3 to show eligibility and IRB was never paid.

[17] The respondent argues that there is no evidence that the applicant was employed prior to the accident or at the time of the accident. It further argues that it sent an EOB on December 2, 2021, advising the applicant that she was not eligible for IRBs because the OCF-2 showed that the applicant’s employment was outside of Canada.

[18] I find that the applicant meets the first part of the test as she was employed for at least 26 weeks during the 52 week period. I disagree with the respondent that no evidence has been produced in this respect, because an OCF-2 was produced to the respondent, which it confirmed receipt of on December 2, 2021. The OCF-2 shows that the applicant worked in China, as an accountant from April 15, 2010 to July 28, 2021, which is approximately 37 weeks in the 52 week period. Therefore, I find that the applicant has established that she was employed at least 26 weeks during the 52 week period.

[19] I also disagree with the respondent’s position that in order to be eligible for pre-104 IRB, there is a requirement for the pre-accident employment to be in Canada, because no such requirement is set out in section 5(1). It is a basic principle of statutory interpretation that every word that is found in a statute has been included there for a reason and is intended to have a purpose. Had the

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legislature intended for eligibility of pre-104 IRB to be restricted to applicants employed in Canada only, then it would have been reflected in the legislation. This was not done, and I must respect the legislature's intent.

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[20] Having found the first part of the test for pre-104 IRB is met, I now turn to the second part, which is that the applicant has to establish that she suffers a substantial inability to perform the essential tasks as an accountant.

[21] The applicant argues that prior to the accident, she was employed full time as an accountant. She further argues that she worked long hours with prolonged concentration and focus. The applicant further argues that she has an inability to work because of her physical and psychological impairments. To this end, she relies upon the clinical notes and records ("CNRs") of Dr. Kris Cheng, physician, an OCF-3, Activities of Normal Life ("OCF-12"), and the s. 25 reports of Mr. Bruce Cook, psychological associate, and Mr. Raymond Wong, occupational therapist, dated June 28, 2022, November 7, 2022, and July 23, 2022.

[22] The respondent argues that the applicant has not established entitlement to pre-104 IRB as she has provided insufficient medical evidence. It further relies upon the s. 44 assessment reports of Dr. Alfonse Marchie, physiatrist, Dr. Shulamit Mor, psychologist, Dr. Id Cavaliere, physiatrist, and Dr. I. Smith, psychologist, dated June 8, 2022 and February 13, 2023.

[23] In my view, the CNRs of Dr. Cheng do not support the applicant's position that she is entitled to IRB because the applicant reported no issues with concentration and focus, and Dr. Cheng did not opine that the applicant is unable to work because of her physical or psychological impairments. In the CNRs, dated November 12, 2021 and February 17, 2023, the applicant reported anxiety, difficulty sleeping, lower back pain, right leg pain, headaches, neck pain, low appetite, dizziness, walking off balance, chest pain, left ankle pain, left knee pain, and left elbow pain which radiated to her left shoulder. However, she reported no issues with concentration and focus. While the applicant reported that her pain was worst with standing, and walking, she has not identified whether these are essential tasks of her employment. Moreover, Dr. Cheng did not opine that the applicant was unable to work as an accountant because of her physical or psychological impairments.

[24] I also acknowledge that on November 12, 2021, Dr. Cheng recommended rest, both physically and mentally, however there is no indication in the CNR that this was in relation to concentration and focus issues. Likewise, Dr. Cheng noted that the applicant moved all extremities equally, and had full range of motion in her cervical spine, bilateral shoulders, elbows, wrists, knees, and ankles. I

acknowledge that Dr. Cheng noted mild tenderness in the applicant’s anterior left shoulder, left medial knee, and left lateral ankle, however, Dr. Cheng did not opine that the applicant was unable to complete her tasks as an accountant as a result.

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[25] I also place little weight on the OCF-3 prepared by Dr. Georgia Palantzas, chiropractor, dated November 10, 2021.

[26] I acknowledge the applicant relies upon the OCF-3 to establish her inability to work, however I place little weight on the OCF-3. Upon review of the OCF-3, I note that Dr. Palantzas opined that the applicant was substantially unable to perform the essential tasks of her employment because it appeared that the applicant had difficulty with sustained postures, standing, walking, sitting, bending, lifting, carrying, pushing, pulling, squatting, and overhead activities. However, I note that an OCF-3 alone does not establish whether the applicant has sustained a substantial inability to perform the essential tasks of her employment. It is a form used to apply for a specified benefit and is not a comprehensive assessment of injuries sustained in an accident. Further, Dr. Palantzas opined that it appeared that the applicant had these functional limitations therefore his opinion was not conclusive. I also acknowledge that the applicant reported on November 12, 2021, that her left ankle pain was worst with walking, however Dr. Cheng did not opine that the applicant was unable to work as an accountant as a result. The applicant has also not addressed in her submissions how long she is required to stand in her job, and whether this is an essential task of her pre-accident employment.

[27] I also find that the applicant has been inconsistent in her self-reporting with respect to whether she has concentration and focus difficulties as a result of her accident-related impairments. Below are examples of the applicant’s inconsistent self-reporting:

i. On May 19, 2022, the applicant reported no difficulty with her concentration or focus to Dr. Mor.

ii. Meanwhile, on June 8, 2022 and June 27, 2022, the applicant reported to Mr. Cook and Dr. Marchie that her attention/concentration was poor and she struggles to keep concentration. Yet a month later (July 23, 2022), the applicant reported no concentration issues to Mr. Wong. The applicant also reported no issues with her focus to Mr. Wong, Mr. Cook, Dr. Marchie and Dr. Mor.

iii. Likewise on November 7, 2022, in the psychological progress report, the applicant reported no concentration issues to Mr. Cook, despite reporting these concerns to him previously. Meanwhile, the applicant now reported difficulties with her focus, despite not raising these concerns to Mr. Cook in the previous assessment. The applicant also has not addressed why her focus issues emerged in November of 2022, and were not previously reported to Mr. Cook, Mr. Wong, Dr. Marchie and Dr. Mor.

iv. Three months later (February 2, 2023), the applicant reported no concentration or focus issues to Dr. Cavaliere. However, four days later (February 7, 2023), the applicant reported to Dr. Smith of being easily distracted and having to take frequent breaks from watching movies because of her poor concentration.

[28] I acknowledge that the applicant relies upon the OCF-12 that was completed by her and her self-reporting to Mr. Cook, to support she is entitled to IRB. However, I place negligible weight on this evidence because of the numerous discrepancies in the applicant's self-reporting, as identified above.

[29] Finally, I place minimal weight on the study permit because it does not establish that the applicant has a substantial inability to perform her essential tasks of her employment, which is the test she has to meet under s. 5(1)1ii. Rather, the study permit demonstrates that the applicant may work as of July 26, 2023 to March 31, 2025.

[30] In conclusion, I find that the applicant has not established entitlement to pre-104 IRB because she has not established on a balance of probabilities that she suffers a substantial inability to perform the essential tasks of her pre-accident employment.

The applicant has not established entitlement to Post-104 IRB

[31] I find that the applicant has not established on a balance of probabilities, that she is entitled to post-104 IRB for the following reasons.

[32] Section 6(2) provides that the benefit is only payable after 104 weeks of disability if, as a result of the accident, the person suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

[33] Here, the applicant argues that she is unable to maintain steady employment in a competitive workplace because of her ongoing pain and psychological

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impairments. She further argues that she is entitled to post-104 IRB because she is competitively unable to engage in her pre-accident employment for which she is reasonably suited by education, training, and experience.

[34] I find that the applicant has fallen well short of establishing entitlement to post-104 IRB. First, the applicant has identified the incorrect legal test in her submissions. The issue is not whether she is competitively unable to engage in her pre-accident employment but whether she suffers a complete inability to engage in any employment for which she is reasonably suited by education, training or experience. The applicant provided no submissions on her education, training and experience. Neither did the applicant identify any other employment beyond her pre-accident employment for which she is reasonably suited. Without this information, I cannot determine whether the applicant has a complete inability under s. 6(2).

[35] Second, as noted above, I have determined that the applicant has not established entitlement to pre-104 IRB because she has not established a substantial inability to perform the essential tasks of her pre-accident employment as an accountant. Therefore, it is difficult to reconcile the applicant's argument that she is entitled to post-104 IRB, where a higher requirement (a complete inability) is required for her accountant occupation.

[36] Finally, the applicant has not tendered medical or financial evidence that is contemporaneous to the post-104 IRB period.

[37] For all these reasons, I find that the applicant has not established a complete inability to engage in any employment for which she is reasonably suited by education, training or experience.

Treatment Plans

[38] To receive payment for a treatment and assessment plan under ss. 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.

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The applicant is not entitled to the OCF-18 for transportation services and fees for documentation, support activity with a remaining balance of $926.63 dated November 10, 2021

The applicant is not entitled to the OCF-18 for transportation services, with a remaining balance of $704.44, dated April 22, 2022

The applicant is not entitled to the OCF-18 for transportation services, with a remaining balance of $733.82, dated August 3, 2022

The applicant is not entitled to the OCF-18 for transportation services, with a remaining balance of $480.00, dated October 4, 2022

[39] I find that the applicant has not met her evidentiary onus to establish that the proposed transportation costs and documentation support activity are payable.

[40] It is undisputed that s.15(2)(c) of the *Schedule* states that an insurer is not liable for transportation expenses “other than authorized transportation expenses.”

[41] Section 3(1)(a) provides that “authorized expenses” are calculated by applying the rates set out in the Transportation Expenses Guidelines published by Financial Services Commission of Ontario (“FSCO”) in The Ontario Gazette. Section 3(1)(b) further provides that unless the insured is catastrophically impaired, transportation expenses are only payable after the first 50 kilometres of a trip.

[42] Problematically, despite the remaining balance for transportation services and the documentation support activity being a live issue in dispute, the applicant offered no submissions to demonstrate why she should be entitled to the remaining balance. Nor did the applicant produce a copy of the OCF-18s in dispute. Instead, the applicant argues that she receives pain relief from the proposed treatment and it increases functionality, therefore it is reasonable and necessary.

[43] I find that the applicant has not met her onus with respect to establishing entitlement to the transportation services because she provided no submissions on this point. There is also no evidence before me that the applicant has sustained a catastrophic impairment as a result of the accident, thus the applicant has not met her evidentiary onus to demonstrate entitlement to the remaining balance for transportation services. In a similar vein, I find that the documentation support activity item is not payable because the applicant provided no submissions on this issue.

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[44] Accordingly, as the applicant provided no submissions, nor did she tender evidence, she has failed to establish entitlement to the remaining balance outlined in the OCF-18s.

The applicant is not entitled to the OCF-18 for physiotherapy services, in the amount of $4,229.56, dated December 6, 2022

[45] The applicant has not demonstrated that the proposed physiotherapy services are reasonable and necessary.

[46] The applicant argues that the proposed physiotherapy services are reasonable and necessary because it specifically addresses her ongoing physical impairments. She further argues that the goals of the treatment are pain reduction, increased strength, increased range of motion, reduced inflammation/swelling and for her to return to her activities of normal living. The applicant also argues that the medical records demonstrate a continued struggle with ongoing physical pain, reduced range of motion and functionality. To this end, she relies upon the CNRs of Dr. Cheng, and the s. 25 reports of Mr. Wong and Mr. Cook.

[47] The respondent argues that pursuant to Dr. Cavaliere's opinion, the denial was maintained.

[48] First, I acknowledge that on February 17, 2023, Dr. Cheng recommended physiotherapy treatment for the applicant's lower back. However, Dr. Cheng did not provide an opinion of whether physiotherapy will reduce the applicant's pain, increase her strength, increase her range of motion, reduce her inflammation/swelling, or allow her to return to her activities of normal living. Moreover, the applicant did not report whether she received any benefit from physiotherapy treatment despite advising Dr. Cheng that she has been attending physiotherapy treatment.

[49] Second, although the applicant reported that she incurred all the OCF-18s in dispute (including the two previous OCF-18s proposing physiotherapy treatment), no records were provided from a treating clinic to indicate the applicant's progress with treatment or any progress reports from the applicable practitioners. Without such evidence, I am unable to assess the efficacy of treatment, and whether the stated goals of the plans were being met to a reasonable degree. I find the lack of CNRs from a treating clinic to be significant because the respondent has already approved physiotherapy treatment in April and October of 2022. Therefore, while I acknowledge that pain relief and a return to daily activities are legitimate goals of treatment, without CNRs from the applicant's

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treating clinic, I am unable to determine whether the goals will be met to a reasonable degree, especially here where the applicant has already been approved for physiotherapy treatment in the time period contemporaneous to this OCF-18.

[50] I acknowledge that the applicant argues that the records confirm that the treatment assisted her with pain and her level of functionality. I disagree. In the February 17, 2023 CNR, the applicant did not report either pain relief or increased functionality from the physiotherapy treatment to Dr. Cheng. Instead, she stated that she has been receiving physiotherapy treatment for her pain. Moreover, the range of motion results were similar to the previous CNR of November 12, 2021. Likewise, the applicant reported to Mr. Wong and Mr. Cook that she was attending for physiotherapy, once a week, but again she did not report any pain relief or increased functionality as a result.

[51] Lastly, I acknowledge the applicant's position that she incurred the physiotherapy services. However, in order for an OCF-18 to be payable by the respondent, the applicant has to establish that the proposed services are reasonable and necessary, which I find she has not.

[52] For all these reasons, I find on a balance of probabilities that the applicant has not established that the proposed physiotherapy services are reasonable and necessary.

The respondent fully approved the OCF-18 for psychological services on April 17, 2024

[53] I find that the OCF-18 for psychological services is no longer in dispute because the respondent on April 17, 2024, approved the remaining balance.

Interest

[54] Interest applies on the payment of any overdue benefits pursuant to section 51 of the *Schedule*. Having determined that no benefits are payable, it follows that no interest is payable.

The respondent is not liable to pay an award

[55] I find that the applicant has not met her burden of proof that the respondent is liable to pay an award.

[56] The applicant sought an award under s. 10 of *Regulation 664*. Under s. 10, the Tribunal may grant an award of up to 50 per cent and interest of the total benefits

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payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.

[57] I find that the applicant has not established that the respondent unreasonably withheld or delayed the payment of the OCF-18 for psychological services. Although the respondent approved the OCF-18 after the application with the Tribunal, the applicant has not referred me to any evidence to establish that the respondent's conduct rose to the level of being excessive, imprudent, stubborn, inflexible, unyielding or immoderate. It is also well-settled law that an award should not be ordered simply because an insurer made an incorrect decision. Thus, I find that the respondent is not liable to pay an award.

ORDER

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

i. The applicant is not entitled to IRB.

ii. The OCF-18 with a remaining balance of $1,047.34 has been fully approved by the respondent, and therefore is no longer in dispute for the purposes of this hearing.

iii. The applicant is not entitled to the OCF-18s in dispute, nor related interest under s. 51 of the *Schedule*.

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

Released: March 19, 2025

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Tanjoyt Deol
Adjudicator

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