Citation: Peng v. Cooperators General Insurance Company, 2025 ONLAT 23-011298/AABS

Licence Appeal Tribunal File Number: 23-011298/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:

Li Peng

Applicant

and

Co-operators General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Lisa Holland**

APPEARANCES:

For the Applicant: Rakesh Sharma, Counsel

For the Respondent: Rebecca Brown Greer, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Li Peng, the applicant, was involved in an automobile accident on September 2, 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, Co-operators General Insurance Company, 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 $86.15 per week from September 9, 2021 to August 31, 2023?

ii. Is the applicant entitled to an IRB in the amount of $185.00 per week from September 1, 2023 to date and ongoing?

iii. Is the applicant entitled to $4,309.56 for physiotherapy services, proposed by Total Recovery Rehab Centre in a treatment plan/OCF-18 ("plan") submitted May 27, 2022?

iv. Is the applicant entitled to $2,200.00 for a psychological assessment, proposed by Somatic Assessments and Treatment Clinic in a plan submitted October 27, 2021?

v. Is the applicant entitled to $5,172.00 ($14,750.81 less $9,578.81 approved) for a catastrophic assessment, proposed by Somatic Assessment and Treatment Clinic in a plan submitted August 21, 2023?

vi. Is the applicant entitled to $13,948.34 for visitor's expenses, submitted on a claim form ("OCF-6") dated July 26, 2023?

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

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

RESULT

[3] The applicant is not entitled to an IRB.

[4] The applicant is not entitled to the treatment plans for physiotherapy services or a psychological assessment.

[5] The applicant is not entitled to the outstanding amounts owing for the treatment plan for catastrophic assessments.

[6] The applicant is not entitled to the claim for visitor's expenses.

[7] The applicant is not entitled to interest or an award.

PROCEDURAL ISSUES

[8] The respondent served and filed a Notice of Motion requesting that the Tribunal strike paragraphs 1-3, 11, 15, 20 and 21 of the applicant's reply because the applicant raises new issues under s. 54 of the *Schedule*, and she also raises the admissibility of surveillance evidence. In the alternative, the respondent seeks to file a sur–reply in response to these issues.

[9] The Tribunal issued a Notice of Motion to be Heard at a Scheduled Event to the parties on November 22, 2024.

[10] The respondent submits that the applicant did not raise issues under s. 54 of the *Schedule* or the admissibility of surveillance evidence in her written hearing submissions. The respondent argues that these submissions should either be struck, or its sur-reply should be taken into consideration.

[11] The applicant filed a response to the applicant's motion. The applicant argues that in her reply, she does not raise new arguments about whether the respondent's notices are compliant with statutory provisions. The applicant argues that in paragraphs 1-3 of her reply, she only refers to the applicant's onus to disprove the reasons in the respondent's s.54 denial notices. I note that s. 54 of the *Schedule* requires that an insurer provide a written notice advising the claimant of their right to dispute the refusal to pay a benefit. However, the applicant does not mention the dates of the denial notices or whether the respondent advised her of the dispute resolution process under s. 54.

[12] The applicant further argues that in paragraph 15 of her reply, she responded to the respondent's submissions at paragraph 19, regarding whether the plan is reasonable and necessary, and she did not raise any concerns about the respondent's notices under s. 54. The applicant argues that in paragraph 20 of her reply, she responded to paragraphs 19 and 21 of the respondent's submissions regarding insufficient evidence in support of a treatment plan. The applicant further submits that since she did not know that the respondent

intended to rely upon the surveillance evidence at the hearing, and she responded to this evidence in paragraph 11 of her reply. The applicant submits that she did not intend to object to the admissibility of the surveillance evidence.

[13] I find that since the applicant did not intend to make submissions under s. 54 of the *Schedule* in her reply, and her reply submissions at paragraphs 1-3, 15, 20 and 21 are admissible.

[14] I find that since the respondent served the applicant with the surveillance evidence within the deadline set out in the Case Conference Report and Order ("CCRO") dated April 2, 2024, the applicant had an opportunity to respond in her reply. I find that the applicant's reply submissions at paragraph 11 are admissible.

[15] Therefore, based on the above reasons, the respondent's motion is dismissed.

ANALYSIS

The applicant is not entitled to an IRB

[16] The applicant seeks an IRB in the amount of $86.15 per week for the period of September 9, 2021 to August 31, 2023, and an IRB in the amount of $185.00 per week from September 1, 2023 to date and ongoing, which covers both periods of pre- and post-104-weeks after the accident.

a) Pre-104 Week IRB

[17] I find that since the applicant has not identified her pre-accident job, I cannot determine the essential tasks, and therefore, she is unable to meet her onus.

[18] To receive payment for an IRB under s.5(1) of the *Schedule*, the applicant must be employed or self-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 asks 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.

[19] The applicant relies on a single document from Canada Revenue Agency ("CRA") with T4 statement of renumeration paid to her for tax year 2021, issued from a corporation, 1896968 Ontario Inc., in support of her claim for an IRB. The applicant submits that in the Insurer's Examination ("IE") report dated December 21, 2022, by Dr. Shulamit Mor, psychologist, the description of her pre-accident

position as cleaning, purchasing products, customer service and banking does not identify the essential tasks of her employment. The applicant submits that the conclusions in the IE report by Dr. Raymond Zabieliauskas and the IE report by Dr. Mor are incorrect since the essential tasks of her pre-accident employment are not adequately identified. However, the applicant does not provide another description of these essential tasks, or the reason she is unable to perform them.

[20] The respondent submits that the applicant was supposedly self-employed as the owner and manager of a karaoke bar, known as 708 Lunch & Bar at the time of the accident. The respondent submits that there is evidence that calls into dispute whether the karaoke bar was in business at the time of the accident. The respondent further argues that as a self-employed person, the applicant has not produced sufficient corporate financial documentation to calculate an IRB.

[21] The respondent submits that it denied benefits by letter dated December 21, 2022, based on Insurer Examination ("IE") reports dated May 11, 2022, by Dr. Raymond Zabieliauskas, physiatrist and Dr. Shulamit Mor, psychologist; and surveillance report dated November 8, 2022, by Intrepid Investigations. The respondent submits that both Dr. Zabieliauskas and Dr. Mor concluded that the applicant did not suffer a substantial inability to perform the essential tasks of her pre-accident self-employment as the manager and owner of a karaoke bar. The respondent further submits that the surveillance evidence depicts the applicant carrying on the duties of an owner and manager of a karaoke bar in purchasing and delivering cases of beer to the bar.

[22] I find that the applicant has not met her burden or produced evidence that indicates she has suffered a substantial inability to perform the essential tasks of her employment or self-employment at 1896968 Ontario Inc. within 104 weeks after the accident. The applicant makes no submissions regarding the name of her employer or the duties of her pre-accident employment.

[23] I find that the applicant does not make any submissions in support of the essential tasks of her pre-accident employment, or self-employment before the accident. Even if I were to accept that she was working in hospitality and her essential duties involved purchasing and delivering cases of beer to the bar, the applicant has not set out the reasons she is unable to perform these duties after the accident.

[24] As a result, I find on a balance of probabilities that the applicant has not met her burden of establishing entitlement to an IRB.

b) Post-104 Weeks IRB

[25] For the reasons set out below, I find the applicant is not entitled to post-104-week IRBs.

[26] The applicant is claiming entitlement to an IRB post-104 weeks after the accident for the period from September 1, 2023 to date and ongoing. The applicant does not address how she has a complete inability to engage in any employment or self-employment for which she is suited by education, training or experience as a result of the accident. Therefore, I find that the applicant has not demonstrated entitlement to an IRB under s.6 of the *Schedule*.

[27] 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.

[28] The applicant does not address the question of whether she satisfies the test for post-104-weeks IRBs in her submissions, and instead, focusing on the merits of her pre-104-week claim only. Therefore, the applicant has not demonstrated how she can discharge her onus. I find that her submissions on her pre-accident employment are not directly relevant to the question of whether the applicant has a complete inability to engage in any employment or self-employment for which she is suited by reason of education, training or experience. The applicant has not provided information or evidence to support her education, training or previous work experience such that she would be unable to work as a result of her accident-related impairments.

[29] The respondent submits that since the applicant was self-employed, her post-104-week entitlement is based on calculations made under s. 4(4) of the *Schedule*, and not the amount of $185.00 per week for an employed person with an IRB amount of a lesser amount, under s. 7(2) of the *Schedule*.

[30] The respondent submits that the evidence suggests that the applicant is able to return to work because there is no medical evidence in support of her inability to return to work as a result of the accident. The respondent further submits that Dr. Zabieliaukas and Dr. Mor concluded that the applicant's accident-related injuries do not prevent her from returning to work at her pre-accident position at the karaoke bar. Although the applicant submits that she has not returned to work, it is the respondent's position that the applicant has not produced any medical records in support of her inability to work.

[31] I find that the applicant has not met her burden of proving on a balance of probabilities that she has a complete inability to engage in any employment for which she is suited by reason of education, training or experience. As a result, the applicant has not established on a balance of probabilities that she is entitled to an IRB under the post-104-week test from September 1, 2023 to date and ongoing. I find that since the applicant has not met her burden to establish entitlement to a post-104-week IRB, it is not necessary to determine the quantum.

Treatment Plans

[32] To receive payment for a treatment plan (OCF-18) 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. 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 same are reasonable.

Issue #2- Plan for physiotherapy services at Total Recovery Rehab Centre in the amount of $4,309.56

[33] I find that the applicant is not entitled to physiotherapy services because the medical evidence does not support that further therapy is reasonable and necessary for the applicant's accident-related injuries.

[34] The applicant seeks payment for a plan dated May 26, 2022, in the amount of $4,309.56 for physiotherapy services, submitted by Ahmed Afifi, physiotherapist of Total Recovery Rehab Centre. The plan consists of 16 two and one half-hour sessions for physical rehabilitation, with provider travel time, documentation support activity, and completion of the OCF-18. The goals of the plan are for pain reduction, increase strength and range of motion ("ROM"), and return to activities of daily living.

[35] The applicant submits that she is entitled to the proposed plan because her injuries fall outside the MIG limit. The applicant relies on the plan itself in which Ahmed Afifi indicates that her ROM remains reduced with pain, and she has not achieved her pre-accident functional abilities. The applicant argues that the disputed plan for physiotherapy services is reasonable and necessary for pain reduction and to improve her functional abilities. The applicant further submits that the IE report by Dr. Zabieliauskas does not address whether the applicant has reached maximum medical improvement, and his report should not be given any weight.

[36] The respondent submits that the applicant has not provided medical evidence in support of the disputed plan, other than the plan itself. The respondent relies on the report of Dr. Zabieliauskas, in which Dr. Zabieliaukas found that the applicant sustained uncomplicated soft tissue injuries, and there is no objective physical impairment or disability. Therefore, Dr. Zabieliauskas concluded the plan is not reasonable and necessary.

[37] I find that the applicant has not met her onus to establish how the proposed plan for physiotherapy services is reasonable and necessary. The applicant only relies on the disputed plan from the treatment provider which indicates she has not reached maximum medical improvement. I find that Ahmed Afifi indicates in the plan that the applicant's situation is complicated by her pre-existing medical history and positive cat scan results. I find that the applicant did not make submissions or provide medical evidence to explain how her condition is affected by her pre-accident medical history and cat scan findings or the reasons physical rehabilitation is reasonable and necessary.

[38] I find on a balance of probabilities that the applicant is not entitled to the proposed treatment plan for physiotherapy services for her accident-related injuries.

Issue #3- Plan dated October 27, 2021 for a psychological assessment

[39] I find that the applicant has not established, on a balance of probabilities, that a psychological assessment is reasonable and necessary.

[40] The applicant seeks payment for a plan dated October 27, 2021, for a psychological assessment, submitted by Dr. Sharleen McDowall, psychologist, in the amount of $2,200.00. The applicant has not produced the complete OCF-18, and therefore, it is not possible to determine the goals of the plan, or whether the assessment is necessary for her accident-related injuries.

[41] The applicant submits that a psychological assessment is reasonable and necessary because Dr. Mor concluded that she has a psychological impairment as a result of the accident. The applicant does not point to any corroborating evidence in support of the plan which indicates that a psychological assessment is reasonable and necessary.

[42] The respondent relies on the IE report dated December 21, 2022, by Dr. Mor, in which Dr. Mor recommended that the applicant return to her treating psychiatrist, Dr. Xiang to resume her medications. Dr. Mor determined that a psychological assessment was not reasonable and necessary since the applicant was already

receiving medical care from Dr. Xiang. The respondent further submits that the applicant makes no submissions regarding why the assessment is reasonable and necessary.

[43] I find that the applicant has not demonstrated that a psychological assessment is reasonable and necessary for her accident-related symptoms because there is no medical evidence in support of the plan, and the plan is not in evidence. Therefore, it is not possible to determine the treatment goals and whether they are reasonable or necessary as a result of the accident. The applicant has not demonstrated that the plan for a psychological assessment is reasonable and necessary as a result of the accident.

Issue #4 – Is the applicant entitled to expenses over and above the $9,578.81 approved listed in the $14,750.81 treatment plan dated August 17, 2023 from Somatic Assessments and Treatment Clinic?

[44] I find that the applicant has not established that the outstanding balance of the OCF-18 dated August 17, 2023 is payable.

[45] The applicant is seeking payment in the sum of $5,172.00 for the following cost of examinations to determine whether the applicant has sustained a catastrophic impairment:

i. Comprehensive file review;

ii. Transportation expenses, and;

iii. Documentation support activity

[46] The cost of examinations to determine whether the applicant has a catastrophic impairment is addressed under section 25 of the *Schedule.* Pursuant to s. 25(1)(5), the insurer must pay for reasonable fees charged for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment, including any assessment or examination necessary for that purpose. Section 25(5)(a) states that the insurer shall not pay more than $2,000.00 plus applicable taxes for any one assessment or examination and for preparing any report connected to it.

[47] To determine entitlement, the applicant must prove on a balance of probabilities that each constituent element that makes up the multidisciplinary catastrophic (“CAT”) determination assessment is reasonable and necessary.

[48] The treatment plan was divided into different examinations by Dr. Joseph Wong, physician, Raymond Wong, occupational therapist and Sedigheh Naisi, psychologist, and additional amounts for comprehensive file reviews by each assessor.

[49] The applicant is seeking additional charges for comprehensive file reviews by Dr. Wong in the amount of $2,000.00; by Raymond Wong in the amount of $1,000.00; and by Sedigheh Naisi, in the amount of $1,000.00, in addition to claimant transportation expenses of $400.00 and documentation support activity of $200.00, plus HST of $572.00.

[50] The onus is on the applicant to prove on a balance of probabilities that each of the examinations and additional amounts for comprehensive file reviews within the treatment plan are reasonable and necessary and if so, whether the fee reasonable.

Is the applicant entitled to comprehensive file reviews?

[51] The applicant submits that the comprehensive file reviews are separate assessments or examinations. The applicant has made no submissions to explain why the comprehensive file reviews are reasonable and necessary separate and apart from the approved examinations.

[52] The respondent submits that the comprehensive file reviews are included in each type of assessment or examination.

[53] I find that the applicant has made no submissions to explain how the comprehensive file reviews are separate assessments or examinations. The Tribunal has consistently found that a file review and report is included in the cost of each examination and, unless the assessor is preparing the final CAT determination report, this does not garner separate payments. I find that since the applicant did not make submissions, she therefore cannot meet her onus.

Is the applicant entitled to transportation expenses?

[54] Section 15(2)(c) of the *Schedule*, provides that the insurer is not liable to pay medical benefits for transportation expenses other than authorized transportation expenses. Further, s. 3(1) of the *Schedule* defines “authorized transportation expenses” as expenses related to transportation (a) that are authorized by, and calculated by applying the rates set out in the most recent transportation expense guideline published by the Financial Services Regulatory Authority of Ontario, and (b) that unless the insured person sustained a catastrophic impairment as a

result of the accident, relate to transportation expenses incurred only after the first 50 kilometres of a trip.

[55] The applicant makes no submissions regarding whether the amounts for claimant transportation are reasonable and necessary.

[56] The respondent submits that once the applicant submits her transportation expenses on a claim form, it will consider whether theses expenses are payable.

[57] I find that the applicant has not met her burden of proof in establishing that the additional charges for transportation expenses are reasonable and necessary.

[58] I find that since the applicant did not make submissions, she therefore cannot meet her onus.

Is documentation support activity payable?

[59] The applicant makes no submissions regarding whether the additional amount of $200.00 is reasonable and necessary for documentation support activity by Dr. Joseph Wong, where the respondent has already approved an amount of $200.00 for completion of the OCF-18 by Raymond Wong.

[60] I find that since the applicant makes no submissions, she therefore cannot meet her onus.

Issue #5 – The applicant is not entitled to the OCF-6 dated July 26, 2023 for visitor expenses

[61] I find that the applicant is not entitled to payment for visitor expenses submitted on an OCF-6 on July 26, 2023.

[62] Section 22(1) of the *Schedule* provides that if the applicant sustains an impairment as a result of an accident, the respondent shall pay for reasonable and necessary expenses incurred not more than 104 weeks after the accident by the following persons as a result of the accident visiting the applicant during her treatment or recovery: the spouse, children, grandchildren, parents, grandparents, as well as brothers and siters of the applicant.

[63] The applicant seeks payment for an OCF-6 in the amount of $13,948.34 which consists of round-trip air travel for the applicant's sister, Hua Peng with travel insurance on two different dates from June to November 2022 and from April to October 2023. The applicant also seeks payment for quarantine costs from November 5 to 13, 2022. The applicant makes no submissions to explain

whether these visits and quarantine costs are necessary or related to her accident-related injuries.

[64] The applicant submits that the expenses were arbitrarily denied by the respondent, however, she does not explain the reason or wording in the denial which was non-compliant.

[65] Although these expenses are related to visits from the applicant's daughter or sister which are both included in the enumerated individuals in section 22(1), the applicant has not established that these expenses are reasonable and necessary.

[66] The respondent submits that the OCF-6 pertains to visits by either the applicant's daughter or sister, and it is unclear why the first visit, ten months after the accident was reasonable and necessary. Further, the respondent submits that the second visit coincides with an unrelated surgical procedure.

[67] I find that the applicant has not proven on a balance of probabilities that she is entitled to the OCF-6 for $13,948.34 for visitor expenses because she has not demonstrated that these expenses are reasonable and necessary.

The applicant is not entitled to interest and an award

[68] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule.* Since no benefits have been unreasonably withheld or delayed, there is no interest payable.

[69] 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.

[70] Since the applicant isn't owed any benefits, there is no basis for an award.

ORDER

[71] For the reasons set out above, I find that:

i. The applicant is not entitled to an IRB.

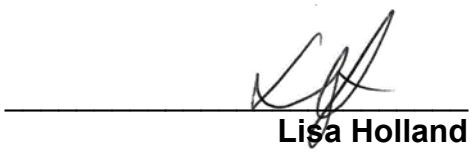
ii. The applicant is not entitled to the treatment plans for physiotherapy services and a psychological assessment, nor the outstanding amounts of the treatment plan for catastrophic assessments in dispute.

iii. The applicant is not entitled to the claim for visitor's expenses.

iv. The applicant is not entitled to interest, or an award.

v. The application is dismissed.

Released: September 18, 2025



Lisa Holland
Adjudicator