

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: **Joseph Monaghan vs. Aviva General Insurance Company, 2019 ONLAT
18-002177/AABS**

**Date: January 8, 2019
File Number: 18-002177/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:

Joseph Monaghan

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: Robert Watt

APPEARANCES:

For the Applicant: Robert Romero, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD: In Writing January 3, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on April 2, 2014 and sought benefits from the respondent pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“*Schedule*”). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“*Tribunal*”).
- [2] The parties participated in a case conference, but were unable to resolve the issues in dispute. This matter, on consent of the parties, was scheduled for a written hearing on Monday November 12, 2018.

ISSUES IN DISPUTE

- [3] The issues in dispute were identified and agreed to as follows:
 - i. Is the applicant entitled to receive a weekly income replacement benefit (IRB) in the amount of \$16.00 per week for the period July 23, 2016 to date and ongoing, denied by the respondent on July 22, 2016?
 - ii. Is the applicant entitled to a medical benefit in the amount of \$1,692.15 for chiropractic services recommended by Kathryn Monaghan in a treatment plan (OCF-18) submitted on March 28, 2016 and denied on March 29, 2016?
 - iii. Is the applicant entitled to a medical benefit in the amount of \$2,907.44 for chiropractic services recommended by Kathryn Monaghan in a treatment plan (OCF-18) submitted on June 20, 2017 and denied on June 28, 2017?
 - iv. Is the applicant entitled to a medical benefit in the amount of \$2,230.58 for chiropractic services recommended by Kathryn Monaghan in a treatment plan (OCF-18) submitted on December 12, 2017 and denied on January 2, 2018?
 - v. Is the applicant entitled to a medical benefit in the amount of \$3,600.00 for chiropractic services recommended by Kathryn Monaghan in a treatment plan (OCF-18) submitted on October 16, 2014 and denied on October 22, 2014?
 - vi. Is the applicant entitled to a medical benefit in the amount of \$2,353.72 for chiropractic services

- vii. Is the applicant entitled to a medical benefit in the amount of \$1,400.00 for chiropractic services recommended by Kathryn Monaghan in a treatment plan (OCF-18) submitted on July 21, 2014 and denied on July 29, 2014?
- viii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULTS

- [4] The applicant is not entitled to receive a weekly income replacement benefit (IRB) in the amount of \$16.00 per week for the period July 23, 2016 to date, and ongoing.
- [5] The applicant is not entitled to receive the medical benefits as set out in paragraphs 3 (ii), (iii),(iv), (v), (vi), (vii), (viii).
- [6] The applicant is not entitled to receive interest.

BACKGROUND

- [7] The applicant was rear ended on April 2, 2014, and reported injuries to his neck, back and right arm. He saw Dr. Zsursama Gabor, general physician on April 29, 2014. The doctor indicated in his report (OCF-3) that the applicant suffered Whiplash WAD2, post traumatic headache, and mild cognitive disorder.
- [8] On April 17, 2014, the applicant who was 63 years of age, submitted his application for accident benefits (OCF-1). The respondent confirmed entitlement to an IRB at \$400.00 per week. The IRB was paid until July 22, 2016. There is no dispute between the parties for the calculation of the IRB at \$400.00 per week, for the period prior to the applicant turning 65 years of age, and \$16.00 per week for the period after the applicant turned 65 years of age.
- [9] The applicant had been working pre –accident, as a claims examiner/independent adjuster. At the time of the accident, the applicant was employed as an Independent Adjuster for Claimsview Inc. since 2001, earning approximately \$1,725.39 per week (\$43.13 per hour) working approximately 40 hours per week. The Employer's Confirmation of Income (OCF-2) dated May 1, 2014, set out the gross weekly income for the last 4 weeks before the accident as \$6,901.50 based on a 40 hour week.¹

¹ The Employers Confirmation of Income Tab 3 applicant's submissions

- [10] The applicant had completed Grade 12 education, obtained a business diploma in the 1970's and further obtained his Chartered Insurance Professional (CIP) certification in the 1990's.
- [11] The applicant did attend Dr. Monaghan, chiropractor, who is also his daughter on 47 occasions from August 17, 2016, to April 3, 2018. There was no indication in the doctor's notes that the applicant could not work.
- [12] On April 8, 2016, the applicant attended for an IE Vocational Assessment by Ms. Rachel Yeboah, psychometrist/vocational assessor. Ms. Yeboah listed seven suitable vocational options for the applicant with the median wage ranging from \$17.86 per hour to \$24.62 per hour. These options would generate approximately \$10,000.00 difference in salary compared to his pre-accident employment.
- [13] On June 7, 2016, the applicant underwent an IE Psychological assessment with Dr. Fabio Salerno psychologist. The report indicated that one option being a collectors/skip tracer/collections investigation officer was not an option for the applicant as the applicant had anger management issues and therefore "this would interfere with the social demands of the occupation." The report indicated that the applicant did not want to receive psychological treatment.² The applicant also indicated to the doctor that he would not go back to the insurance industry as he did not "ethically agree with his job"³ The report diagnosed adjustment disorder with mixed anxiety and depressed mood. The report also indicated that the condition assessed would not result in the complete inability for the applicant to engage in any employment for which he was suited by way of education, training, or experience.⁴ Dr. Salerno confirmed these findings in an addendum report.⁵
- [14] The applicant attended an IE assessment with Dr. Oshidari psychiatrist. His report dated May 11, 2016, noted: that the applicant was completely independent with his activities of daily living; that there was no neurological injury; there was some limitation in the cervical spine, lumbar spine and bilateral shoulders. He concluded that the applicant did not suffer a complete inability to engage in any

² IE Assessment Report completed by Dr. Salerno Tab E page 18A Respondents Submissions

³ Ibid 3 p 18

⁴ Ibid 3 p 26

⁵ See Tab H Respondent's Submissions

employment for which he was suited by education, training or experience.⁶ His Addendum Report upheld his initial findings.⁷

- [15] The respondent undertook surveillance of the applicant in February 2015. The applicant was observed to walk and drive without issue.⁸The applicant was observed to bend over to pick up two recycling bins and carry them to the curb.
- [16] The respondent questions the applicant's pre-accident earnings, as the applicant has not produced the applicant's employment file, or income tax returns requested by the respondent.⁹ The respondent questions whether the applicant was paid a salary or an income for hours worked, and suggests that the applicant was only earning the medium wage as set out in the Vocational Assessment Report.
- [17] Dr. Hudes, a Chiropractor, on an IE assessment concluded that further chiropractic sessions were not reasonable and necessary. Dr. Hudes concluded in his report dated February 8, 2016, that the applicant reported an 80-85 % improvement in symptoms. Dr. Hudes also concluded that further treatment was unlikely to provide the applicant with further benefit.¹⁰
- [18] Dr. Marchuk, a Physiatrist on an IE assessment, concluded that further chiropractic treatment was not reasonable, nor necessary, and that further treatment of a similar nature was unlikely to provide the applicant with further benefit.¹¹ Dr. Marchuk's report concluded that the applicant had reached maximum medical recovery and that further facility based treatment would not aid the applicant's recovery.¹²
- [19] The applicant has access to collateral benefits through RTO/ERO for medication, chiropractic, and psychological services. The applicant was approved for chiropractic benefits in the amount of \$1,100.00 in 2015, six chiropractic sessions in 2016. No chiropractic sessions were applied for in 2017.¹³

⁶ IE Assessment Report completed by Dr. Oshidari dated May 11, 2016 Tab d of Respondent's Submissions-pages 10, 13

⁷ IE Assessment Report completed by Dr. Oshidari Tab G of Respondent's Submissions

⁸ Surveillance Report Mantis Investigation dated February 19, 2015 Tab 1 page 4

⁹ Letters dated April 27, 2018 and June 26, 2018 Tab K

¹⁰ IE assessment dated February 8, 2016 Tab R page 6

¹¹ IE Assessment dated April 11, 2018 Tab S p23

¹² Ibid 10 p24

¹³ RTO/ERO Collateral Benefits File Tab Q pages 2, 3, 4, 5

ANALYSIS

Income Replacement Benefit

- [20] The *Schedule* requires, after the first 104 weeks of disability, for the insured person to suffer a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience, before any IRB is paid.¹⁴ This is referred to as the complete inability test. The onus is on the applicant to prove he is entitled to a post-104 IRB from July 23, 2016 and ongoing.
- [21] The applicant's position is that he is still having problems with his right shoulder, right knee, right elbow, thumb numbness, psychological limitations, and therefore he can't work. The six vocational options also don't pay the same wages as his pre-accident wages, and therefore are not comparable job options.
- [22] The applicant's position is that Dr. Yeboah has not confirmed the availability of any jobs in respect of the six options recommended, nor has Dr. Yeboah provided evidence that an employer would hire the applicant because of the applicant's age (65) and because of the applicant's current psychological limitations.
- [23] The respondent's position is that the applicant does not suffer a complete inability to work. The respondent's position is based on the IE reports of Rachel Yeboah, Dr. Fabio Salermo, Dr. Oshidari and the surveillance report. All of this evidence indicates that the applicant does not suffer a complete inability to engage in employment.
- [24] Firstly, it is the responsibility of the applicant and not Dr. Yeboah to find employment. The medical evidence before me indicates that the applicant can work. Secondly, I find that there is no medical evidence even from Dr. Monahan, that the applicant can't work in employment to which he is suited because of his experience and training. All the medical reports indicate that the applicant does not suffer a complete inability to engage in employment. The applicant has provided no evidence to show that he has applied for work in the six areas of work options, recommended by Dr. Yeboah and has had trouble working, as required, in any of those options.

¹⁴ *Schedule* s. 6(2)

[25] I therefore find that the applicant has not met the requirements of the *Schedule* by suffering a complete inability to engage in employment to which he is reasonably suited by education, training and experience.

Medical Benefits for Chiropractic Services (Issues 11 –viii)

[26] The *Schedule* requires all medical benefits incurred to be reasonable and necessary before being paid¹⁵.The insured must have received the goods and services and paid, or promised to pay or be legally obligated to pay for the expense.¹⁶

[27] The *Schedule* requires an insured to apply to their collateral benefits provider first before they can claim for payment from the respondent.¹⁷

[28] I have no evidence before me that the collateral benefits for chiropractic sessions have been exhausted, such that the applicant can now seek payment for said sessions from the respondent. I therefore find on this ground alone that the applicant is not entitled to seek benefits for chiropractic benefits from the respondent.

[29] There is also the additional issue of whether the medical benefits for chiropractic services are reasonable and necessary. The applicant was approved by RTO/ERO for chiropractic benefits in the amount of \$1,100.00 in 2015, six chiropractic sessions in 2016. No chiropractic sessions were applied for in 2017.¹⁸ This would either indicate in 2017, that the applicant didn't need more sessions, or could have if more sessions were required, applied to RTO/ERO.

[30] The applicant did attend Dr. Monaghan, chiropractor, 47 times from August 17, 2016, to April 3, 2018 with these sessions overlapping some of the other sessions through RTO/ERO.

[31] Dr. Hudes and Dr. Marchuk as noted above, both concluded that further chiropractic sessions were not reasonable and necessary as the applicant had reached maximum medical recovery. Dr. Hudes had indicated that the applicant reported 80-85% improvements. Dr. Monaghan also states in her letter dated May 2, 2018, that "pain typically responds inadequately to appropriate medical,

¹⁵ *Schedule*. 15(1)

¹⁶ *Schedule* 3(7)(e)

¹⁷ *Schedule* 47 (2)

19Dr. Monaghan Notes

physical and psychological care, and that the focus must shift from absolute care to effective management.”¹⁹

[32] I find that that therefore that the treatment plans submitted are not reasonable and necessary.

INTEREST OWING

[33] I find that there is no interest owing as there were no overdue payment of benefits.

Released: February 14, 2019



**Robert Watt
Adjudicator**

¹⁹ Letter from Dr. Monaghan dated May 28, 2018 at Tab k p 3