

**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: Colleen Comegna vs. Aviva Insurance Canada, 2020 ONLAT 19-003244/AABS

**Released Date: 04/27/2020
File Number: 19-003244/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:

Colleen Comegna

Applicant

and

Aviva Insurance Canada

Respondent

PRELIMINARY ISSUE DECISION

ADJUDICATOR: Robert Watt

APPEARANCES:

For the Applicant: Colleen Comegna, Applicant
Andrew Franzke, Counsel

For the Respondent:
Ramandeep Pandher, Counsel

**HEARD: In Writing December 2, 2019 Heard by way of written
submissions**

OVERVIEW

- [1] The applicant was involved in an automobile accident on February 13, 2014, and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "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] A motion order dated October 3, 2019 set out the following preliminary issues:
- a. Is the applicant barred from seeking a determination that the injuries sustained in this motor vehicle accident were not subject to the Minor Injury Guideline, as that issue has already been determined by the Financial Services Commission of Ontario ("FSCO")?
 - b. If the application is dismissed on the above ground, is the respondent entitled to an order for costs?

RESULTS

- [3] The applicant is barred from seeking a determination that the injuries sustained in this motor vehicle accident were not subject to the Minor Injury Guideline
- [4] The respondent is not entitled to an order of costs.

BACKGROUND

- [5] In an arbitration decision released on February 21, 2017, FSCO Arbitrator Charles Matheson found, on the evidence before him, that the applicant's injuries fell within MIG and were not linked to the same accident at issue here. These findings of the decision were not appealed.
- [6] Arbitrator Matheson also found that the applicant's alcoholism was not a pre-existing condition upon which the applicant could rely to take her out of the MIG. At that hearing, the following doctors gave evidence: Dr. Kopyto, Dr. Paitich and Dr. Valentin, psychiatrist also gave evidence. Derek Adam, an occupational therapist, also gave evidence. An Occupational Therapy In-Home Functional Report dated December 12, 2016 by Brenda Labrow OT was also put into evidence.
- [7] As part of the FSCO hearing, the applicant complained about being in constant pain and that the pain prevented her from participating in activities. She also complained of having some seizures and headaches.

- [8] The applicant claims that she now has fresh evidence that was previously unavailable: a Neurological Report dated March 8, 2017 written by Dr. Abunaji, neurologist; a Biopsychosocial Assessment Report written by Dr. Nazila Isgandarova Physiotherapist, dated May 22, 2018; a Psychiatric Report written by Dr. Waisman psychiatrist, dated September 24, 2018, and a future care Needs and Costs Analysis by Julian Amchislavsky occupational therapist, dated June 15, 2019.
- [9] Dr. A. Kopyto, general practitioner, on an insurer's examination on March 8, 2019, reviewed the additional medical records submitted by the applicant and came to the conclusion that the applicant's injuries were still minor in nature.¹

ANALYSIS

Is the applicant barred from seeking a determination that the injuries sustained in this motor vehicle accident were not subject to the Minor Injury Guideline (MIG), as that issue has already been determined by the Financial Services Commission of Ontario ("FSCO")?

JURISDICTION OF LICENCE APPEAL TRIBUNAL (LAT) TO HEAR APPLICATION

- [10] As of April 1, 2016, Section 280 of the Insurance Act requires the resolution of all new disputes relating to the Statutory Accident Benefits be heard by the Licence Appeal Tribunal. FSCO no longer has the jurisdiction to hear cases once they have become finalized before it.
- [11] The applicant did not appeal the finding of Arbitrator Matheson, on the issue of whether her injuries fell within the MIG, making his decision on that issue, final.
- [12] If the application was to proceed, LAT would have the jurisdiction to hear it.

NEW EVIDENCE

- [13] Any application to change a finding must be based on "fresh" new evidence that was not available on the arbitration or appeal, that would conclusively impeach the original results, or that there is an error in the order.²
- [14] There are no reasons put before me as to why the fresh evidence was not available to Arbitrator Matheson on the hearing in January 2017. I also don't find

¹

Report of Dr. A. Kopyto, dated March 8, 2019, Tab 7.

² *Belair insurance Company Inc. and David McMichael*, Office of the Director of Arbitrations Appeal Po5-00006, Tab 14: *Canada in Toronto(City) v. CUPE local 79[2003]* 3 S.C.R.

that the fresh evidence comes to any new conclusions than the evidence which was put before Arbitrator Matheson. The fresh evidence does not show a material change in circumstances. It confirms the chronic pain issue that the applicant presented as part of her evidence before Arbitrator Matheson. This is also confirmed by the IE report of Dr. A. Kopyto.

- [15] All of the new reports rely heavily on the applicant's self-reporting. All of the new reports come to the same conclusion: that the applicant has chronic pain/anxiety /depression.
- [16] I find that the "new evidence" does not conclusively impeach the original results. The new reports do not indicate any changes in the applicant's medical condition from the time of the first hearing, or a contrast with the findings indicated in the previous medical evidence. There is not any fresh new evidence and previously unavailable evidence, that would warrant waiving the principle of *res judicata*.
- [17] The findings of the new reports mirror the same complaints of the applicant at the time of the FSCO hearing, being chronic pain, depression, anxiety, seizures etc.

Res Judicata

- [18] The doctrine of *res judicata* prevents a party from re-litigating a dispute that has already been decided. It has two parts, being action estoppel and issue estoppel. There are four prerequisites to be established before a finding of *res judicata* may be made. Those four prerequisites are: the same parties must be in both actions; the prior claim must be within the jurisdiction of the court; the prior adjudication must have been on the merits, and the prior decision must have been a final judgement.³
- [19] All of the criteria for *res judicata* have been met in looking at the applicant's current application. In both applications, the parties are the same, the claim is within the jurisdiction of the Tribunal, the prior decision was heard on the merits on January 17, 18, and 19, 2017, and the decision of Arbitrator Matheson finding that the injuries fell within the MIG was not appealed, making the decision a final decision.
- [20] I find therefore that the doctrine of *res judicata* applies based on the above to the current action before LAT and that therefore, the applicant cannot proceed.

³ *DT and Wawanessa Mutual Insurance Company* 2019 ONLAT 18-005613/AABS Tab 6; *Toronto (City) V C.U.P.E.* [2003]3 S.C.R.


COSTS

- [21] Rule 19 of the LAT Rules allows the Tribunal to award costs, if a party has acted unreasonably, frivolously, vexatiously, or in bad faith to award costs against any party.
- [22] There is no evidence before me indicating that any party has acted unreasonably, frivolously, vexatiously, or in bad faith.
- [23] I therefore make no findings as to costs.

CONCLUSION

- [24] For the reason set out above, I find that:
- a. The applicant is barred from seeking a determination that the injuries sustained in this motor vehicle accident were not subject to the Minor Injury Guideline
 - b. The respondent is not entitled to an order of costs.

Released: April 27, 2020



Robert Watt
Adjudicator