Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Ontario

Citation: Liao v. Aviva General Insurance, 2021 ONLAT 19-004856/AABS

Release date: 06/29/2021
File Number: 19-004856/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:

Jing Ru Liao

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Monica Chakravarti**

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Surina Sud, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] The applicant was involved in a motor vehicle accident on April 22, 2016 and sought benefits from the respondent for income replacement benefits and medical and rehabilitation benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*"). The respondent denied these benefits and the applicant commenced an application at the Tribunal to resolve the disputes.

THE ISSUES IN DISPUTE

[2] The issues to be decided in this hearing are:

a. Is the applicant entitled to income replacement benefits (IRBs) in the amount of $400.00 per week from September 1, 2016 to date and ongoing?

b. Is the applicant entitled to medical and rehabilitation benefits in the amount of $1,897.58 for chiropractic treatment recommended by Point Grey Physio in a treatment plan (OCF-18) submitted on September 11, 2018 and denied on September 25, 2018?

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

RESULT

[3] For the reasons noted below the applicant is not entitled to income replacement benefits and is not entitled to the medical and rehabilitation benefit. As no benefits are due and owing there is no entitlement to interest.

ANALYSIS

Income Replacement Benefits

[4] The applicant submits that following the accident she returned to work, however her attempt at a return to work was not successful due to her accident related impairments. The applicant ceased working on August 31, 2016 and therefore she is entitled to IRBs due to her being substantially unable to work as a result of the injuries sustained in the accident.

[5] The respondent argues that the applicant is not entitled to IRBs because firstly the applicant did not comply with the request for documents to complete her IRBs

[1] O. Reg. 34/10, as amended.

application and calculation until November 26, 2019 when she provided the requested documents under s.33 and specifically the employer's confirmation of income form (OCF-2) and therefore prior to November 26, 2019 there is no entitlement to IRBs. Following November 26, 2019 and in the alternative to the above the respondent argues that the applicant has not shown that she is substantially unable to perform her pre-accident job and has not shown that she is substantially unable to perform any job for which she is reasonably suited.

[6] The applicant responds and argues that the respondent firstly did not comply with the *Schedule* in responding to the application for IRBs which the applicant argues is November 9, 2016 and therefore the IRBs are payable.

Withholding of IRBs

[7] Pursuant to section 36(2) in application for a specified benefit/IRBs the applicant shall submit a completed disability certificate (OCF-3) with his or her application (OCF-1) under section 32.

[8] The applicant provided an OCF-1, application for accident benefits form shortly following the accident. A completed OCF-3 was provided on November 9, 2016.

[9] As per s.36(2) the applicant's application for IRBs was completed on November 9, 2016.

[10] Pursuant to section 36(4) within ten business days after the insurer received the application and completed disability certificate the insurer, if they are not paying the benefit, shall give the applicant a notice explaining the medical or other reasons why the insurer believes the person is not entitled to the benefit **or send a request to the applicant under ss33(1) or (2)**.

[11] Pursuant to section 33(1) an applicant shall within 10 business days after she receives a request from the insurer, provide the insurer with any information reasonably required to assist the insurer in determining the applicant's entitlement to the benefit.

[12] Here the OCF-3 was provided on November 9, 2016. On December 20, 2016 the respondent sent a notice to the applicant advising her that her OCF-1 states that her injuries do not prevent her from working but that the OCF-3 indicates the opposite and that she is unable to work due to her accident related injuries. The respondent then requested documentary information.

[13] Specifically, the request letter of December 20, 2016 states that to reconcile the conflicting details between the OCF-1 and OCF-3 the respondent is requesting the following:

- OCF-2 (employer confirmation form completed by your employer)
- Pre and Post Accident employment income documents (paystubs)
- Supporting medical evidence outlining limitations regarding employment

[14] The applicant in the above letter is warned that no benefit is payable until the above is received.

[15] Under section 33(6) the *Schedule* states that the insurer is not liable to pay the benefit for the period of time in which the applicant fails to comply with section 33(1) i.e. the request for reasonably required information.

[16] The applicant does not dispute that the above request was reasonable, and the applicant does not dispute that the above was required by the respondent.

[17] I find that the respondent in providing the letter of December 20, 2016 invoked section 33(1) of the *Schedule*. The respondent requested information that was reasonably required to not only calculate the IRB – the OCF-2 and paystubs- but also requested information about the inability to work due to the injuries and limitations. The applicant was also warned that the consequences of non-compliance found in s.33(6) would also be relied upon by the respondent.

[18] Thus, the respondent provided a proper section 33 request on December 20, 2016 and the respondent is able to rely on same.

[19] Following this request the pay information was submitted on January 8, 2018, the OCF-2 was not submitted.

[20] On January 7, 2019 the respondent made another request for the OCF-2 pursuant to section 33. The OCF-2 was not provided until November 26, 2019.

[21] Pursuant to s. 33(6) the respondent is not liable to pay for the IRB until the applicant has complied with the section 33 request. Under subsection 33(8) if the applicant complies with the section 33(1) request for the documents the insurer shall resume payment and if a reasonable explanation is provided by the applicant for the non-compliance of the section 33 request the respondent shall pay all amounts that were withheld.

[22] The allowance for a reasonable explanation by the applicant for non-compliance is echoed in section 34 of the *Schedule* and states that a person's failure to comply with the time limits [in this case the ten business days noted in section 33(1)] does not disentitle them to the benefit if the person has a reasonable explanation for the delay.

[23] The delay in providing the pay information was over one year and the delay in providing the OCF-2 was almost three years.

[24] Based on the evidence I find that the applicant has provided no reasonable explanation for the delay in providing her paystubs which are presumably in her possession.

[25] The applicant submits that the employer, TomCom Link, was unresponsive in providing the OCF-2 and despite her efforts the OCF-2 was delayed. The applicant submits that it is unfair to delay the applicant's IRBs because of the failures of third party.

[26] I agree with the applicant that if the delay in the OCF-2 was due to the employer and despite evidence of best efforts the OCF-2 was still not forthcoming that that act could be construed as a reasonable explanation. However, there is no evidence that the employer withheld or delayed the OCF-2 or that despite the applicant's efforts that the OCF-2 could not be provided sooner.

[27] I acknowledge that there was also a s.33 request for the employment file on January 7, 2019. This was the first time it was requested by the respondent. The applicant made efforts in 2019 to obtain the employment file[2]. I also acknowledge that despite a further letter to the employer on August 13, 2020 and a summons for the employment file the employer still did not provide same for the hearing. The applicant has provided evidence of best efforts to get the employment file, however there is no evidence of best efforts to get a completed OCF-2 or that the reason for the delay in providing the OCF-2 is the employer.

[28] There is no evidence of the applicant attempting to provide the OCF-2 in 2017, 2018 and most of 2019. There is no evidence that the applicant had issues obtaining the OCF-2 from her employer following the request for same by the respondent on December 20, 2016 especially considering that the employer ultimately provided the OCF-2. There is no evidence of any issues with the employer filling out the OCF-2. There are no letters or even an acknowledgement to the respondent that the applicant was making efforts to obtain the OCF-2 as of

[2] Request letters for employment file dated July 4, 2019 and November 21, 2019.

December 20, 2016 but that the issue was the employer. There are also no letters, email, or any evidence that after receipt of the letter of December 20, 2016 the applicant made any efforts to provide the OCF-2 to the respondent.

[29] Therefore, I find there was no reasonable explanation of the delay in providing the OCF-2.

[30] In keeping with the *Schedule*, the respondent was entitled to withhold IRBs (assuming same were payable) as there was no reasonable explanation for the delay in providing the reasonably required documents that were requested pursuant to section 33 of the *Schedule*.

Substantive Entitlement to IRBs

[31] The applicant correctly points that the *Schedule* requires that the respondent provide notice within ten business days following the completed application for IRBs. As noted above, the application for the IRBs in this matter was completed upon receipt of the disability certificate which the parties agree was completed on November 9, 2016. The response from the respondent came after the 10 business days noted in the *Schedule*. Therefore, if the applicant was entitled to IRBs in the first instance then pursuant to s.36 (6) the respondent should pay the IRBs starting on November 9, 2016 and ending on December 20, 2016 when the respondent provided the section 33 request.

[32] Therefore, I must determine if the applicant was entitled to IRBs following the completion of the application for IRBs. i.e. as of November 9, 2016.

[33] As per the letter from the employer, TomCom Link dated October 27 of an undecipherable year, the applicant was working in the accounting department since July of 2015. The OCF-2 provides the employment details as bookkeeping and accounts receivable. The respondent does not dispute the bookkeeping accounts receivable as her job description, however the applicant submits that she was also an accountant and the respondent argues that she has no certification as an accountant which is a professional designation and that her yearly income of $20,800.00 per year falls well short of what the expected income is for an accountant.

[34] The applicant as well reports to the insurer examination (IE) assessors that her work involves performing booking keeping, answering phones, performing CRA remittances and payroll. Based on the evidence I find that at the time of the accident the applicant was working in the accounts receivables and performing booking, keeping, payroll and remitting services at the time of the accident.

[35] Pursuant to s.5(1) IRBs are payable if the applicant sustains an impairment as a result of the accident and within 104 weeks is substantially unable to perform the essential tasks of her job. The applicant has the burden to show what the essential tasks of her job are and that her accident related injuries result in a substantial inability to perform those tasks.

[36] The applicant has not met her evidentiary burden to show substantial entitlement to IRBs. The only evidence of the essential tasks of the applicant's pre-accident job are as noted in the IEs and the OCF-2 which merely provide a description of her responsibilities and not her essential tasks. The applicant makes submissions as to what the day to day tasks of her job entails however submissions are not evidence. There is no direct or indirect evidence for that matter that allows for an analysis of the essential tasks of her job at TomCom Link.

[37] Further, the applicant must show that her entitlement to IRB begins as of November 9, 2016 when the application for IRBs is completed. The only evidence provided to show her inability at that time is the OCF-3 of November 9, 2016. Following the accident, the applicant returned to work and worked until August 30, 2016. There are no clinical notes and records from any treating doctors provided as evidence in this hearing. There is one referral note of Dr. Margh of April 27, 2016 but no actual clinical notes that provide information as to what the applicant's injuries and impairments were as of August 30, 2016 when she stopped working and onwards to the end of 2016 and how those impairments affect her ability to perform the essential tasks of her job.

[38] Therefore, based on the above the applicant has not shown that at the time of OCF-3 of November 9, 2016 that she was substantially unable to perform the essential tasks of her pre-accident job as a result of accident related impairments. There is no evidence provided by the applicant as to what her essentials job tasks were and how her impairments from the accident prevent her from performing those essential tasks. Without evidence of the tasks that are completed and the details surrounding same there cannot be an understanding of the essential tasks and by extension what limitations if any the applicant faced with respect to her job tasks as of November 9, 2016.

[39] The applicant is seeking entitlement to IRBs following the 104 weeks post accident. Section 6(2)(b) states that the substantive test changes following the 104 weeks after the accident in that applicant is entitled to IRBs if the insured person is suffering from a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience. Again,

the applicant has the burden to show that her accident related impairments affect her ability to engage in any type of employment for which she is suited.

[40] The applicant has not met her evidentiary burden. First, she has not provided evidence as to her education, training or experience. Again, other than her reporting a degree in statistics and actuarial science to the IE assessors and her work at TomCom Link there is no evidence of any further work experience. While I acknowledge that this could be the applicant's first job following her obtaining her degree, I do not have confirmation of same nor any evidence indicating this. Further other than the information provided in the IE there is no evidence of what the applicant's training or experience is or the fact that there is no further training or experience.

[41] Even putting aside the lack of information regarding what the applicant could be reasonably suited for employment wise, the medical evidence does not support a complete inability to do any type of job. The applicant again provides no treating clinical notes and records. She provides the records of the physiotherapy clinic but points to nothing specific to show her inability to work at a reasonably suited job.

[42] The only medical evidence provided by the applicant in support of her entitlement to IRBs are the OCF-3 of November 9, 2016 and subsequent OCF-3 dated November 24, 2017, the IE report of Dr. Sethi, psychiatrist, of July 26, 2016, the psychologist report of Dr. McDowall of November 29, 2017 and the re-assessment report of Dr. Palantzas, chiropractor of July 24, 2018.

[43] Dr. Sethi diagnoses the applicant with specific phobia with driving. He does not opine that she is unable to work. Dr. Palantzas notes that the applicant mentions her inability to do her housework, but there is no mention in his re-assessment of her self-reporting an inability to perform job related tasks. The psychological assessment of Dr. McDowall as well does not provide any insight into the applicant's pre-accident job and current limitations nor does it provide any opinion that is helpful regarding her inabilities as a result of her accident related impairments. The report of Dr. McDowall is based on only the self-reporting of the applicant with no corroborating evidence.

[44] There is also no evidence that the applicant has seen a treating doctor since the accident, let alone reported any psychological, emotional, or physical limitations as a result of accident related injuries and impairments. Aside from a referral from Dr. Margh a few days following the accident there has been no clinical notes and records provided from Dr. Margh or any other doctor. The respondent provides evidence, which I accept, that despite requests from the respondent

directly to providers for clinical notes and records from three years pre-accident to March 14, 2017 there were no records regarding any visits by the applicant to any medical providers post-accident.

[45] The only evidence of post-accident visits to a health care provider are the clinical notes and records from Point Grey Physio but these records are not helpful in assessing the applicant's ability to work nor does the applicant point to anything in the notes to satisfy her evidentiary burden that she is substantively unable to work at any employment.

[46] Based on the above the applicant has not met her evidentiary burden to prove on a balance of probabilities that as a result of accident related impairments that she has an inability to engage in any employment for which she is reasonably suited by education training or experience.

The Medical and Rehabilitation Benefit

[47] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant has the onus of proving on a balance of probabilities that the benefits she seeks are reasonable and necessary and are related to the accident. To do so, the applicant should demonstrate that the goals as identified are reasonable, that the goals are being met to a reasonable degree and the cost of achieving the goals of treatment are reasonable taking into consideration both the degree of success and the availability of other treatment.

[48] The applicant has not met her onus as the applicant has provided little evidence to show what her accident related physical injuries or impairments are and how the treatment goals in the disputed OCF-18 for chiropractic treatment are reasonable and necessary to deal with those accident related physical injuries and/or impairments.

[49] The applicant does not provide or point to the treatment plan in support of her position (the respondent does however provide the treatment plan). The applicant provides no medical evidence of what the goals are or how they will be achieved or the availability of other treatment. The applicant submits that her pains improve with treatment, however, as there are no clinical notes and records recommending let alone agreeing to the necessity or reasonableness of treatment.

[50] As indicated above there are visits to medical professionals following the accident and despite the applicant attending at treatment there is no follow up to assess or re-assess her accident related physical impairments by any medical professionals.

[51] Therefore, based on the above, the applicant has not met her onus to show that the treatment plan in dispute is reasonably necessary.

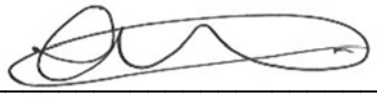
Interest

[52] As there are no benefits payable there is no entitlement to interest.

ORDER

[53] The application is dismissed in its entirety.

Date of Issue: June 29, 2021



Monica Chakravarti, Adjudicator