

**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: **Yecenia Alvarez vs. Aviva Insurance Company, 2019 ONLAT 18-003247/AABS**

**Date: December 3, 2019
File Number: 18-003247/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:

Y.A.

Appellant(s)

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR:

Meray Daoud

APPEARANCES:

Applicant:

Y.A.

Counsel for the Applicant:

Matthew Hyland

Representative for the Respondent:

Chris Viveiros

Counsel for the Respondent:

Gina Nardella

Counsel for the Respondent:

Surina Sud

Interpreter:

Susan De la Torre, Spanish

HEARD:

Oral Hearing: January 17, 2019

OVERVIEW

- [1] The applicant, Y.A. was involved in an accident on June 16, 2015, and sought benefits from the respondent, pursuant to the provisions of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “Schedule”). The applicant’s claim for statutory accident benefits was denied by the respondent and the applicant filed an application with the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) to resolve the matter.

ISSUES IN DISPUTE

- [2] The issues to be decided at this hearing are:
- a) Is the applicant entitled to an income replacement benefit in the amount of \$359.80 weekly from April 29, 2016 to date and ongoing?
 - b) Is the applicant entitled to the cost of a vocational assessment in the amount of \$2,200.00 plus HST, recommended by All Health Medical Centre in a treatment plan (OCF-18) submitted on April 27, 2017 and denied on June 27, 2017?
 - c) Is the applicant entitled to the cost of a functional abilities assessment in the amount of \$2,060.00 recommended by All Health Medical Centre in an OCF-18 submitted on June 9, 2017 and denied on June 27, 2017?
 - d) Is the applicant entitled to interest on any overdue payment of benefits?
 - e) Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

- [3] Based on the totality of the evidence before me, I find that:
- a) The applicant is not entitled to income replacement benefits in the amount of \$359.80 per week for the period of April 29, 2016 to date and ongoing.
 - b) The applicant is not entitled to the cost of examinations for a vocational assessment.
 - c) The applicant is not entitled to the cost of examinations for a functional abilities assessment.

¹ O. Reg. 34/10.

- d) As the applicant is not entitled to income replacement benefits nor the cost of examinations, she is not entitled to interest.
- e) The applicant is not entitled to an Award

Administrative Issues

- [4] Within her closing submissions, the applicant states that there was a typographical error within the case conference order, with respect to the amount in dispute in issue b), as listed.
- [5] The applicant submits that the correct amount in dispute should be \$5,119.00, which is the full cost of the vocational assessment.
- [6] The respondent disagrees in it's closing submissions and stated that the amount was agreed on at the case conference, as listed, as this is the maximum amount payable for cost of examinations, as per the *Schedule*.
- [7] This issue was not brought before me at the oral hearing, nor was there any discussion about the amount in dispute as listed, until the receipt of the applicant's closing submissions. I have no direct knowledge of what was agreed on at the case conference, and I am guided by the case conference report. Had there been an issue with respect to the listed issues within this report, the applicant had ample opportunity, well before their closing submissions, to bring this to the tribunal to be dealt with appropriately.
- [8] The issues shall remain as listed within the case conference report and my decision will be made in line with the above.

ANALYSIS

Income Replacement Benefit:

Within 104 weeks:

- [9] The applicant bears the onus of proving that, on a balance of probabilities, she is entitled to an income replacement benefit (IRB) in the amount of \$359.80 per week for the time period of April 29, 2016 until the 104 week mark, specifically June 16, 2017.
- [10] Section 5(1) of the Schedule sets out the test for entitlement of income replacement benefits. The applicant would be entitled to an income replacement benefit if he could establish, on a balance of probabilities, that she was employed

at the time of the accident and, as a result of and within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of his employment.

- [11] The applicant had been involved in multiple work place accidents and suffered injuries prior to the subject motor vehicle accident. She received WSIB benefits from March 6-14, 2014.
- [12] The applicant had stopped working as of November 23, 2014 at Gate Gourmet, where she was a Flight Kitchen Assistant and received Employment Insurance (EI) benefits.
- [13] She underwent lumbar decompression surgery on February 2, 2015.
- [14] The applicant also applied for Canada Pension Plan (CPP) disability benefits, and was approved in 2015. She has been receiving CPP disability benefits since July 2015.
- [15] The applicant received IRBs in the amount of \$\$359.80 per week, for the time period of January 8, 2016 to April 29, 2016. The respondent terminated the IRB benefit via Explanation of Benefits (EOB) dated April 19, 2016. The basis for denial states that the applicant does not suffer a substantial inability to perform the essential tasks of her employment as a direct result of the accident.
- [16] The applicant submits that she suffered multiple injuries as a result of the accident. During the hearing, the applicant testified that as a result of the accident she suffers from pain all over her body, including her neck, shoulders, wrists, headaches, as well as she continues to feel pain in her back and leg.
- [17] The applicant further submits that she is unable to perform the essential duties of her own occupation, as a Flight Kitchen Assistant, due to these accident related injuries.
- [18] During her testimony at the hearing, the applicant stated that her job required a lot of physical movement, that she prepared food for airlines and that she worked with three other employees on her line. She stated that they prepared about 83 trays per cart and that there were about 9-10 carts per plane. She was also responsible to check everything in order and to move the trays on to the cart.
- [19] The parties submitted medical records, which were reviewed and considered in coming to this decision. I will be referring to specific medical records below, which are relevant to the time period in dispute.

- [20] The applicant submitted a note from her family physician, Dr. Barrett, dated May 10, 2016, wherein he addresses it “to whom it may concern”. Dr. Barrett writes that the applicant has been a patient of his since October 2012 and that she has an ongoing and severe disability which renders her unable to work. He also notes that she has an appointment with the neurosurgeon on June 7, 2016. It is worth noting, there is no evidence before me with respect to any consultation with a neurosurgeon as mentioned.
- [21] I do not have other records from Dr. Barrett which provide me with a detailed understanding of the applicant’s condition or limitations, with respect to her employment, for the time period which the applicant is claiming IRBs.
- [22] There are no records, before me, from any other treating physicians, or treatment facilities during the time period being claimed.
- [23] The Applicant submitted an Orthopaedic Assessment Report by Dr. O. Benmofath, Orthopaedic Surgeon, dated October 20, 2016. He writes that the applicant’s current complaints include, headache, neck, shoulder, back and wrist pain, issues with sleep, mood, decreased energy, memory and concentration. Dr. Benmofath diagnoses the applicant with, post-traumatic headaches, myofascial strain to the cervical spine, myofascial strain to both shoulders, myofascial strain to the thoracic spine, right wrist pain, myofascial strain of the lumbar spine, exacerbation of pre-existing degenerative disc disease of the lumbar spine, as well as chronic pain syndrome. His prognosis for recovery was guarded.
- [24] Dr. Benmofath addresses the applicant’s employment activities in a section of his report. He notes that in his medical opinion he does not think she is capable of returning to this type of employment due to her pain related limitations. Dr. Benmofath writes that she has difficulty standing, lifting, carrying, pushing/pulling, overhead reaching, repetitive neck and upper extremity movements. He continues to say her chronic pain will negatively affect her concentration, endurance and performance reliability. Dr. Benmofath opines that the applicant’s return to work in the future would depend on the results of the chronic pain management treatment.
- [25] Dr. Benmofath makes several recommendations including the benefit of a referral to a multi-disciplinary rehab facility that specializes in treatment of chronic pain syndrome.
- [26] Dr. Benmofath’s report did not provide an analysis of her job duty requirements nor details of the extent of the limitations he notes the applicant exhibited, and how these would impede her capacity to perform her essential work tasks.

- [27] The Applicant also submitted a Functional Capacity Evaluation Report (FCE), completed by Atila Balaban, Exercise Physiologist, dated June 9, 2017. Mr. Balaban notes that the applicant reported that she worked as a flight kitchen assistant five days a week, eight hours per day and sometimes worked overtime. He writes that her job duties included food preparation, loading dishes, assembling meals (line work). Mr. Balaban writes that the physical demands of her job included standing/walking (entire shift), repetitive upper extremity manual work, reaching, bending, lifting and carrying.
- [28] Mr. Balaban provides an overall comparison of functional capacity to job physical demands. He opines that given the results and objective observations of his evaluation, its reasonable to conclude that the applicant's current functional capacities are not consistent with meeting the most essential of the physical demands required by her pre-accident work as a Flight Kitchen Assistant.
- [29] The respondent had multiple Insurer's Examinations completed, including a Functional Abilities Evaluation Report (FAE), Work Demands Analysis, as well as a Medical Physician's Assessment report. These reports formed the basis of their denial of the income replacement benefit.
- [30] The respondent's FAE, completed by Johanna Harding, Occupational Therapist and Natalie Ornella, Physiotherapist, is dated April 14, 2019. The assessment provided a detailed chart with columns comparing task, requirements, current physical ability and comments. Although they found that the applicant demonstrated ability below the sedentary level, the assessors did opine that the applicant did not provide effort consistent with someone providing maximal effort and in their opinion the applicant may be capable of demonstrating a higher level of physical tolerances.
- [31] The Insurer's Medical Physician Assessment completed by Dr. I. Finkelstein, Physician, Headache and Pain Clinic, dated April 14, 2016, notes that the applicant's ongoing complaints include, headaches, neck, shoulder and low back pain. Dr. Finkelstein diagnoses the applicant with cervical strain, bilateral shoulder strain, tension type headaches and lumbar strain with pre-existing DDD and spinal stenosis.
- [32] Dr. Finkelstein opines that the physical examination did not reveal any valid indicators of orthopedic or neurological abnormalities to support accident related impairments. He notes her re-existing medical issues. He goes on to say that the applicant suffered soft tissue injuries that would be accident related given the temporal relationship of symptom onset and the subject accident. Dr. Finkelstein

opined that the applicant doesn't suffer a substantial inability to perform the essential tasks of her employment as a direct result of the subject accident.

- [33] Other than the above, I have not been provided with any further evidence within the time period in dispute to support the applicant's argument that she is unable to perform the essential tasks of her pre-accident job. The information before me has not provided me with a fulsome view of the applicant's condition, treatment, limitations and capacity and how this would affect her ability to return to work. Other than the FCE dated June 9, 2016, a week shy of the 104-week mark, the very few medical reports within the relevant time period, did not provide me with an in-depth understanding of the applicant's limitations and their effect on performing the essential tasks of her pre-accident employment.
- [34] There is simply not enough contemporaneous medical evidence submitted by the applicant to support her entitlement to income replacement benefits during the disputed time period. The applicant has not adduced sufficient medical evidence to show that she suffered a substantial inability to perform the essential tasks of her pre-accident employment from April 29, 2016 to.
- [35] Based on the totality of the evidence before me, I find the applicant has not proven, on a balance of probabilities, that she suffered from a substantial inability to perform the essential tasks of her pre-accident employment as a Flight Kitchen Assistant for the period of April 29, 2016 to June 16, 2017. The applicant has not met her burden of proving her entitlement to IRBs and accordingly, I find that the applicant is not entitled to IRBs for the time period in dispute.

Post-104 Week Entitlement:

- [36] As I have not found the applicant to have suffered from a substantial inability to perform the essential tasks of her pre-accident employment within the 104 week period, based on the same reasoning, I find the applicant is not entitled to post-104 weeks income replacement benefits.

Cost of Examinations

- [37] Section 25 of the *Schedule* establishes the insurer shall pay for reasonable fees charged by a health practitioner for reviewing and approving a treatment and assessment plan including any assessment or examination necessary for that purpose, if any one or more of the goods, services, assessments or examinations described in the treatment and assessment plan have been:
- I. approved by the insurer;

- II. deemed by this Regulation to be payable by the insurer; or
- III. determined to be payable by the insurer on the resolution of a dispute described in subsection 280 (1) of the Act

- [38] The applicant is seeking payment for the cost of a vocational assessment in the amount of \$2,200.00 plus HST, recommended by All Health Medical Centre in a treatment plan (OCF-18) submitted on April 27, 2017 and denied on June 27, 2017.
- [39] The applicant is also seeking payment for the cost of a functional capacity assessment (FCE) in the amount of \$2,060.00 recommended by All Health Medical Centre in an OCF-18 submitted on June 9, 2017 and denied on June 27, 2017.
- [40] The applicant submits that these assessments were necessary in order to properly evaluate and investigate the nature of the applicant's disability and the extent to which it impedes her ability to be employed.
- [41] The applicant goes further to state that the insurer's examinations were done in 2016 and no further or updated assessments were undertaken by the respondent to appreciate the applicant's ongoing impairments. She submits that it is entirely reasonable that given her prolonged absence from work, due to the injuries from this accident, that these assessments be preformed to assist in appreciating her future employment prospects.
- [42] With respect to the FCE, the goals of this assessment are listed on the OCF-18 as pain reduction, increased range of motion and increase in strength with the functional goal to have the applicant return to activities of normal living.
- [43] The goals of this assessment are not in line with the reasoning the applicant submits make this assessment reasonable and necessary. The applicant clearly submitted that they felt the assessments were necessary to assess the extent of the applicant's ability to be employed, however "return to pre-accident work activities" was not checked off as a goal for this assessment, despite it being a listed option.
- [44] As for the vocational assessment, the goals listed in the OCF-18 are, return to pre-MVA employment status or explore options for alternative employment with the functional goal of return to pre-accident work activities.
- [45] Although the goal of this assessment is indeed in line with the applicant's submissions, I have not been pointed to any further evidence to support the reasonableness and necessity of the exam. The mere statement that further

assessments should be completed as the last IE's were done in 2016, is not sufficient. A gap in time between assessments, in itself, is not enough to prove entitlement.

[46] I do not find that there is enough evidence to support the need for the functional capacity assessment, nor the vocational assessment. I stress fact that the burden is on the applicant to prove that the assessments in dispute are reasonable and necessary.

[47] The applicant has not met her burden in proving, on a balance of probabilities, that either of these assessments are reasonable and necessary, and as such the applicant is not entitled to payments for these cost of examinations.

INTEREST

[48] As I have found that the income replacement benefit and cost of examinations in dispute are not payable, no interest is payable.

AWARD

[49] The applicant seeks an award pursuant to section 10 of Reg.664, R.R.O. 1990 :

(10) If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Licence Appeal Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory Accident Benefits Schedule, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule.

[50] As I have found that the income replacement benefit and cost of examinations in dispute are not payable, the respondent could not have unreasonably withheld or delayed payments and as such, no award shall be granted.

ORDER

[51] The application is dismissed.

Released: December 3, 2019



**Meray Daoud
Adjudicator**