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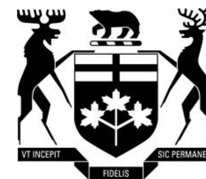

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Date: 2017-06-30
Tribunal File Number: 16-000068/AABS
Case Name: 16-000068 v Royal Sun Alliance Insurance Company of Canada

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:

Applicant

Applicant

and

Royal Sun Alliance Insurance Company of Canada

Respondent

DECISION

Adjudicator: Susan Sapin

Appearances: Johathan S. D. Wakelin, Counsel for the Applicant

Geoffrey Keating, Counsel for the Respondent

Hearing Format: In person on: October 17, 2016
Written submissions filed.

OVERVIEW

[1] The applicant, a 33 year-old self-employed tow truck driver under contract with the Canadian Automobile Assistance company (CAA), was injured in a motor vehicle accident around midnight on April 26, 2015 when his tow truck was rear-ended at an intersection as he waited for a green light. The impact was such that the tow truck, a 13,000 pound vehicle, was pushed into the intersection. The car that hit it crashed into a traffic light and knocked the pole over, then flipped upside down. Police and ambulance were called to the scene. Both vehicles were rendered undriveable and had to be towed away. Ambulance attendants noted the applicant's complaint of back pain with numbness and tingling down the back of his right leg and advised him to go to the hospital. He chose instead to wait for a colleague to tow his truck, and went to see his family doctor the next day. The applicant sustained whiplash injuries and has been unable to return to his job due to ongoing debilitating pain in his back, hip, groin and right leg, and regular pain in his neck shooting down his right arm, as well as headaches. He had to repair his tow truck and eventually had to sell it at a loss because he could not keep up the lease payments. He went into debt, and when his injuries failed to heal even after treatment, he developed anxiety, depression and suicidal thoughts.

[2] The applicant applied for and received statutory accident benefits, including income replacement benefits (IRBs), from Royal Sun Alliance Insurance Company of Canada (RSA) under the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*"). RSA terminated IRBs after eight months, on December 15, 2015. The applicant disputes RSA's termination.

[3] The issue in dispute in this hearing is as follows:

1. Is the applicant entitled to an income replacement benefit (IRB) under s. 5(1)2 of the *Schedule* on the basis that he is substantially unable to complete the essential tasks of his pre-accident employment?

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[4] I find that the applicant is entitled to an IRB from December 15, 2015 and ongoing as he is unable to return to his pre-accident employment as a tow truck operator.

[5] The parties have agreed that the only issue in dispute in this hearing is whether or not the applicant meets the statutory test for entitlement to an IRB. The issue of the actual amount to which he is entitled is not before me.

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[6] To be entitled to an IRB under ss. 5(1)2 of the *Schedule*, the applicant must establish on a balance of probabilities that, as a result of the accident, he suffered an impairment that renders him substantially unable to complete the essential tasks of his employment as a tow truck operator.

[7] The applicant submits that he developed sciatica in his right leg and pain radiating from his neck into his right shoulder and arm as a result of the accident. These injuries have been verified by his treating practitioners through objective testing and EMG studies, which RSA does accept. These injuries, as well as severe ongoing pain and headaches, render him unable to return to work as a tow truck driver.

[8] RSA maintains that MRIs of the applicant’s neck and back indicate there is no cervical or lumbar nerve root impingement and, even if there is, the applicant’s symptoms are caused by pre-existing degenerative disk disease of the neck and back, not the accident. Furthermore, the applicant’s physical and psychological symptoms became much worse after he received nerve block injections from a negligent pain specialist, and so, RSA maintains, his ongoing symptoms cannot be attributed to the accident. Finally, RSA submits that the applicant’s symptoms pre-date the accident, and that inconsistencies in his recollection of some events undermine his credibility.

[9] Having reviewed all of the evidence before me and having heard the testimony of the applicant, I find that the evidence supports that but for the accident, the applicant would have been able to continue in his chosen career. I find the applicant to be entirely credible, his subjective complaints have been consistent from the outset and

are supported by the evidence of his treating practitioners, and his accident injuries prevent him from returning to work as tow truck driver. I find RSA's position to be untenable. In particular, I find RSA's evidence, especially that of its key insurer examiner, Dr. R. Lexier, to be deficient in significant aspects as set out below.

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Essential Duties:

[10] The Dictionary of Occupational Titles classifies tow truck operator as a medium strength occupation involving, at the very least, frequent lifting of 20 to 50 pounds from shin to upper chest level. I accept the applicant's uncontradicted evidence that his essential duties involved quite a bit more. They included a "huge" amount of deep bending and lifting very heavy loads (high and low) often in rapid succession, and lots of kneeling/squatting and very vigorous activity hooking up vehicles and equipment and changing heavy wheels and tires (often while kneeling and while jacking with the other arm). The applicant testified that an inflated wheel/tire on a common Ford PI 50 truck weighs over 100 pounds. He was required to climb under vehicles and pull out debris, heavy rocks, and to pull on body components to move vehicles. He used dollies weighing 50 to 70 pounds, and he would regularly push whole vehicles (alone) to roll them and change their position. In winter months, he has had to shovel snow vigorously. This work was interspersed with long periods of sitting, often on highway on-ramps, where it was too dangerous to get out and stretch or walk around. He worked 10 to 12 hour days in often difficult conditions.

[11] There is no evidence to contradict the applicant's assertion that he was perfectly capable of engaging in all of the heavy duties of a tow truck operator for the six years he spent in that job before the accident, or that he has been anything but a hard worker since he graduated from high school. He studied auto body repair at Centennial College and completed a 7800 hour apprenticeship while working part time at the Home Depot, where he received an award for customer service. He then worked there full time while learning to be a tow truck driver. He worked for four years from 2009 to 2013 for a towing company contracted to CAA, his first job in the

industry. The president of the company wrote him a reference stating that the applicant "distinguished himself by consistently achieving high customer satisfaction scores, excellent attendance, and above average revenue generation." The applicant then worked for two more CAA contractors before purchasing his own tow truck in April 2015 and getting his own CAA contract. He preferred to work under contract to CAA because it was a reputable company. His plan was to continue working himself because he enjoyed the work, and eventually hire other drivers.

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Credibility and Causation:

[12] I found RSA's attempts to challenge the applicant's credibility regarding his pre-accident health and the cause of his injuries to be unconvincing. RSA questioned a visit to the applicant's family doctor in June of 2011 for x-rays of his neck and back. The applicant explained he had a stiff neck and back from sitting and just wanted to make sure everything was okay. Considering the nature of his job, I find this reasonable and accept the applicant's explanation. I accept the applicant's testimony that a shoulder injury and minor neck stiffness from a motor vehicle accident in 2008, and a work injury at Home Depot resolved after physiotherapy. I note the OHIP summary for the three years before the accident indicates the applicant did not seek investigations or treatment for musculoskeletal issues despite his full time physically demanding work.

[13] RSA also challenged the applicant's recollection of the events of the night of the accident, claiming his testimony differed from the ambulance call report in two respects. The first discrepancy arises from the statement in the report that "pt. has co-worker on scene to tow his truck away…Pt. left on scene with co-worker and police," whereas the applicant's evidence is that he was *waiting* specifically for a CAA tow truck to tow his vehicle, because he did not trust anyone else to do it in case the expensive equipment on his truck would "disappear." There was another tow truck at the scene preparing to tow the other vehicle and I find it likely that is what the ambulance call report refers to. I accept the applicant's explanation as

more reliable than the hearsay report of ambulance attendants who I find would have been more concerned about the applicant's refusal to go to the hospital with them than with the details of who was going to tow his truck. I do not accept RSA's submission that this example undermines the reliability of the applicant's evidence.

[14] RSA alleges a second discrepancy between the ambulance call report and the applicant's evidence in that the report states the applicant had numbness and tingling from the right buttock area down the back of his right leg, but that he denied neck or back pain and could move all four limbs freely and there were "no other injuries." I disagree that this undermines either the applicant's credibility or causation. I note the ambulance call report lists the applicant's chief complaint as "back pain, primary." Furthermore, I accept the applicant's testimony that he felt sharp pain in his neck, right arm, back and leg the next day and visited his family doctor, who immediately sent him for x-rays of the neck and back. The x-ray report states the clinical history as "31-year old male with back strain and possible sciatica." The x-rays showed asymmetry of the cervical spine and straightening of the lumbar lordosis that were both "possibly due to muscle spasm." I find the x-ray results are compatible with the undisputed WAD-II (Whiplash-Associated Disorder) soft tissue injuries to the applicant's neck and back from the accident, and I find it confirms his early complaints of right leg pain. Finally, Disability Certificates completed by treating health practitioners beginning May 20, 2015 (less than one month post-accident) described diagnoses of WAD II with neck pain and musculoskeletal signs; sprains and strains of the cervical, thoracic and lumbar spine; and lumbar radiculopathy. I find these diagnoses confirm that the applicant consistently reported symptoms of right leg pain and sciatica from the beginning.

[15] I find the discrepancies raised by RSA regarding the ambulance call report are of no significance. They neither undermine the reliability of the applicant's evidence nor do they support RSA's theory that the accident did not cause his impairments.

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[16] The ambulance call report is a crucial document in this case because it confirms that the applicant complained of pain in his lower back with symptoms radiating from his buttock down his right leg immediately after the accident. It confirms that the ambulance attendants thought the complaint serious enough that the applicant should go to the hospital with them, and that they told him so. It undermines the opinion of Dr. Lexier, who made no reference to these symptoms in his first IE report December 9, 2015. In later reports, Dr. Lexier stated that the applicant never complained to him of these symptoms the first and only time he examined him, and did not change his opinion when evidence of right leg pain was submitted to him.

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Medical Evidence:

[17] When the applicant's condition failed to improve after the accident, his family doctor referred him to a number of specialists, including Drs. R. Wilson, neurologist; G. Gale, chronic pain specialist; A. Kachooie, physiatrist, T. Getahun, orthopaedic surgeon; L. Lempert, psychologist; and S. Redjvani, a chiropractor who conducted a Functional Abilities Evaluation. I prefer the evidence of these practitioners over that of Dr. Lexier, RSA's orthopaedic surgeon and key expert, because unlike Dr. Lexier, and despite his criticisms of their conclusions, I find they conducted more thorough physical examinations, performed more objective physical testing to assess sciatica and sacroiliac joint dysfunction, and took all of the applicant's complaints into consideration when formulating their opinions.

[18] Dr. Kachooie first assessed the applicant on August 11, 2015 and then in December, and again in February, May and August 2016. He detailed his examinations, test results and findings in a report dated August 29, 2016. He noted the applicant's complaints of neck pain, worse on the right and spreading to the shoulder, shoulder blade and back of the skull causing severe "vice-like" headaches and diffuse lower back pain with numbness and weakness of the right leg and pain to the right hip, groin and buttock. All of which caused pain and discomfort with activity. He carried out nerve conduction (EMG) studies of the right arm and leg. Both studies were

abnormal and confirmed his clinical findings of cervical radiculopathy of the right C6 and discogenic back pain with some symptoms of right S1 radiculopathy.

[19] Dr. Kachooie conducted a number of objective clinical tests at every visit, such as the straight leg raising (SLR) test. This test, used to detect sciatica and possible herniated disk, was “markedly” positive for the right leg. Spurling’s test for the neck, another medical manoeuvre to a assess nerve root pain, was also positive. He noted marked positive tenderness corresponding to the sacroiliac (SI) joint with positive Gaenslen’s test and Patrick’s signs. He noted that pelvic, compression and distraction techniques were positive. More tests are described in his report. By August 2016, eight months after RSA stopped paying for physiotherapy and other treatments, Dr. Kachooie noted a deteriorating physical and psychological state and diagnosed the applicant with chronic pain syndrome.

[20] Dr. Kachooie also ordered MRIs of the neck and back in November 2015 that revealed degenerative disc disease in both areas. Dr. Kachooie and Dr. Lexier disagree about whether these MRI reports reliably indicate nerve root impingement or evidence of accident-related impairment. They do agree that the MRI’s indicate multi-level degenerative changes in the applicant’s spine, including small disk herniation. RSA relies heavily on Dr. Lexier’s opinion that the images establish that the applicant’s pain and disability result from the pre-existing degenerative changes and not the accident, and that the MRI’s do not show nerve root involvement in any event.

[21] I do not find these MRI results determinative in any event. I prefer the opinion of Dr. Kachooie that the accident played a significant role in, and was a primary cause of, the applicant’s impairment because it does not rely only on the results of the MRIs, but because it draws on a broader base of information, such as careful history-taking, observation of the applicant over time, and a variety of clinical tests repeated over time with consistent results. I find Dr. Kachooie’s opinion that the applicant’s underlying degenerative joint disease was rendered symptomatic and made dramatically worse by the accident to be a balanced and reasonable medical

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explanation that is more consistent with the evidence as a whole than the opinion of Dr. Lexier, who never examined the applicant specifically for sciatic pain and so did not conduct relevant clinical tests such as the straight leg test to either confirm or rule out the diagnosis.

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[22] Regarding the substantial inability test, I accept Dr. Kachooie's findings that the applicant would be unable to return to any type of heavy physical work, either tow truck operator or body shop technician, given his pain and physical limitations. Two FAEs corroborate this. The first, conducted on RSA's behalf by Dr. D. Jevric, chiropractor, in November 2015 concluded that despite inconsistencies in testing and suboptimal effort, the applicant demonstrated he was not able to meet the lifting and carrying requirements of his pre-accident employment, although he was observed to sit for 45 minutes without distress.[1] Due to suboptimal effort, the Dr. Jevric stated she deferred any conclusions to medical specialists (i.e. Dr. Lexier).

[23] The second FAE, conducted nine months later in August 2016 for Dr. Kachooie by Dr. S. Redjvani, chiropractor, noted that the applicant put forth a consistent and reliable effort (based on heart rate during exertion, which is an objective measure) and observed his limbs shaking as he attempted to carry out the manoeuvres required. Dr. Redjvani concluded he did not meet the safety criteria at the Light strength level according to the DOT and was significantly limited in performing his activities of daily living and his pre-accident functional responsibilities.

[24] Dr. Gale, a pain specialist who treated the applicant, reported in an August 2016 chronic pain assessment that the applicant's ongoing pain and functional limitations would interfere with all of his day-to-day activities, especially his return to the labour market. Dr. Gale conducted objective tests such as Gaenslen's for sacroiliac joint dysfunction (with positive results on the right), among others. He opined that the applicant's impairment of function of the cervical and lumbar spine and the right

[1] Dr. Jevric's report was summarized and quoted in both the December 9, 2015 reports of Dr. Chan and Dr. Lexier. Although the report is listed at Tab E of RSA's Exhibit book, submitted electronically, the only report at that tab is Dr. Jevric's Physical Demands Analysis report, with the last two pages missing.

upper and lower extremities affected important bodily functions necessary for work-related activities. I find this a competent and reliable assessment on its own merits.

[25] RSA urged me to reject Dr. Gale's opinions on two grounds: the first, because he administered nerve blocks to the applicant that were unsuccessful and worsened his pain and depression. RSA submits that this, and not the accident, is responsible for the applicant's ongoing pain and depression. The second ground is that Dr. Gale's license was restricted in 2001 by the College of Physicians and Surgeons and his practise required supervision for 9 months in 2015, suggesting his opinion is unsound.

[26] I dismiss these arguments. That the nerve block injections were unsuccessful does not alter the fact, and my finding, that the accident injuries aggravated the applicant's underlying disk disease which was asymptomatic before the accident. There is no evidence the injections caused lasting physical damage or impairment. They were not intended as a cure. It is understandable that the applicant's depression worsened after the injections, based on his evidence about his profound disappointment when they did not help relieve his pain, his fear that his pain might be permanent, and his worry about the future. Dr. Gale remains licensed to practise medicine and continues to do so. I do not accept that his license restriction sixteen years ago or the recent supervision of his practice affects his ability to conduct an assessment based on clinical findings or to provide a reasonable opinion based on his assessment.

[27] RSA also urged me to accept the opinion of Dr. Lexier, that the applicant's physical impairments are not accident-related, over that of Dr. T. Getahun, an orthopaedic surgeon who assessed the applicant in August 2016, because Dr. Getahun had been found professionally negligent in a lawsuit in 2014 for improperly casting a wrist injury in 2005. I fail to see the relevance. I find Dr. Getahun based his opinion on a thorough physical examination of the applicant including clinical tests and review of documents and diagnostic tests. He concluded that the applicant's orthopaedic-related injuries (chronic myofascial strain of the cervical and

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lumbosacral spine with C6 and S1 radiculopathy and aggravation of pre-existing changes) were directly caused by the accident, and that the applicant would be unable to return to his job because of them. I accept Dr. Getahun's opinion on its merits.

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[28] A neurological assessment and opinion by Dr. R. Wilson supports the findings of Drs. Kachooie, Gale and Getahun that mechanical disturbance of the spine and right shoulder caused by the motor vehicle accident is responsible for C6-7 and L5-S1 radiculopathy and ensuing pain and limitation of movement in the neck, back, and right shoulder, arm and leg.

[29] Dr. Lexier first assessed the applicant on behalf of RSA on November 9, 2015. He prepared a report and three subsequent addenda in February, September and October 2016 in response to additional information from the applicant. In his first report, Dr. Lexier noted complaints of neck and back pain made worse by standing, bending and crouching, and formed the opinion that the accident injuries did not prevent the applicant from working as a tow truck driver. He did not identify what those injuries were. When provided with additional information about the applicant's consistent complaints to others of right leg pain radiating from his back, Dr. Lexier's response was that the applicant did not complain of these symptoms to *him*. He did not change his original opinion in his later addenda.

[30] I place little weight on Dr. Lexier's opinion for a number of reasons. I find his examination of the applicant was cursory and perfunctory, with none of the relevant testing conducted by other examiners. He did not test the extremities despite the applicant's complaints of back and neck pain and his observation of limited range of motion with pain. He did not conduct a straight leg test. There was no diagnosis, no explanation for the applicant's pain, and the only test he did perform, relating to the right arm, was not explained.[2] He noted the applicant's right hip and shoulder were hiked compared to the left, with no explanation or further exploration.

[2] The December 9, 2015 report describes this test as: "Examination of the upper extremities confirms that the right radial arterial pulsation obliterated at 100° with his elbow extended and was accompanied by

[31] In his February 2016 addendum, Dr. Lexier stated that he did not endorse the diagnoses of Dr. Kachooie and others of cervicular or lumbar radiculopathy, in particular sciatica and sacroiliac dysfunction, because the applicant did not complain of these symptoms to him when he examined him. He also did not endorse the diagnosis of chronic pain, but that would be outside his specialty as an orthopaedic surgeon who only saw the applicant on one occasion. As to the two November 2015 MRI reports of the cervical spine and lumbosacral spine, Dr. Lexier advised that these were “normal degenerative changes in the background of congenitally short pedicles in the cervical and lumbar region,” which were age-related and not directly related to soft tissue injuries incurred in the accident. This is the first time Dr. Lexier described the applicant’s accident injuries. What is missing from Dr. Lexier’s analysis is an explanation of what type of age-related changes *would* be normal or average in a 32-year old man, or whether they could cause the sciatica or sacroliliac joint pain the applicant complained of.

[32] In his September 2016 addendum, Dr. Lexier belatedly explained that he suspected the applicant had bilateral thoracic outlet syndrome which was unrelated to the motor vehicle accident and was confusing the clinical context for his complaints of numbness in the upper extremities. This bald statement of a possible diagnosis that appears nowhere else, and symptoms not noted in Dr. Lexier’s first report, is not helpful without more explanation. As it is well known that thoracic outlet syndrome can result from trauma, this is something Dr. Lexier should have addressed. His opinion that Dr. Kachooie’s EMG and nerve conduction study showing radiculopathy is not consistent with the November 2015 MRIs is equally unhelpful. Again, Dr. Lexier simply repeats his opinion that the applicant has no accident-related radicular symptoms because he did not complain of them at the November 2015 examination, and that any symptoms result from degenerative changes. Furthermore, he reviewed Dr. Getahun’s report and noted his diagnosis of chronic myofascial strain of the

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complaints of pain. With his elbow flexed I was able to palpate the artery out to 180 and desisted with complaints of pain. His left radial arterial pulsation obliterated at 135 on two occasions and he complained of pain.”

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cervical spine and aggravation of pre-existing degenerative changes, but did not address this aspect of causation.

[33] In his third and final addendum on October 28, 2016, Dr. Lexier added little to his original opinion. He reported that Dr. Kachooie noted that when he (Dr. Kachooie) assessed the applicant on February 24, 2016 the applicant was primarily experiencing persistent symptoms of pain in the neck, pain and numbness in the right upper extremity, pain in the lower part of the back, and pain and numbness to the right lower extremity. Dr. Lexier stated, "These symptoms were different than those which were reported to me in my office on November 9, 2015 of strictly neck and back pain without complaints of radicular symptoms in either the upper or the lower extremities."

[34] At no time did RSA provide Dr. Lexier with the ambulance call report where radicular symptoms were reported at the scene of the accident. Regardless, these symptoms appear in virtually all of the medical documents given to Dr. Lexier to review. I find his refusal to acknowledge them or to address the possible effects of significant soft tissue injuries on underlying degenerative disk disease seriously weakens his report.

Psychological Issues:

[35] I reject RSA's submission that pre-existing psychological stressors explain the post-accident Adjustment Disorder with Anxiety and Depressed Mood diagnosed by both its psychological assessor, Dr. A. Chan, in December 2015, and the applicant's treating psychologist, Dr. L. Lempert, as of July, 2016. I accept the applicant's testimony that Ms. N. Khramtsova, R. N., was clearly mistaken in her February 2016 report that he suffers ongoing headaches, dizziness/blurred vision/tinnitus, neck pain with right upper limb radiation, low back pain with right lower limb radiation, nightmares/flashbacks, sleep difficulties, sadness, and anxiety as a result of a motor vehicle accident in 2008, when in fact he told her these symptoms related to the

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2015 accident. RSA did not point me to any contemporaneous evidence that would corroborate Ms. Khramtsova's report.

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[36] I find the applicant's account of his loss of confidence and self-esteem and his worry that he will be unable to marry or support a family in the future because of physical injuries sustained in the accident that abruptly ended a career he enjoyed and made a success of far more compelling. I find his psychological condition is made worse by pain that has become chronic. Although I find that it is his physical injuries and pain, and not his psychological condition that prevent him from returning to work as a tow truck operator, or any other work with similar physical requirements, the applicant's depression and anxiety may very well affect his ability to pursue some other work if not addressed.

Conclusion:

[37] I find on a preponderance of the evidence that the applicant meets the substantial inability test under s. 5 of the *Schedule* and is entitled to IRBs from December 19, 2015 and ongoing, as well as interest on overdue benefits in accordance with the Schedule.

Released: June 30, 2017

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Susan Sapin, Adjudicator