Citation: Rosoli v. Aviva General Insurance, 2022 ONLAT 21-009076/AABS - PI

Licence Appeal Tribunal File Number: 21-009076/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:

Adya Rosoli

Applicant

and

Aviva General Insurance

Respondent

PRELIMINARY ISSUE DECISION [AND ORDER]

ADJUDICATOR:	**Tavlin Kaur**
APPEARANCES:	
For the Applicant:	Adya Rosoli, Applicant Agal Lankeswaran, Paralegal
For the Respondent:	Jennifer Walters, Representative Surina Sud, Counsel
Written Hearing:	**Heard by way of written submissions**

REASONS FOR DECISION [AND ORDER]

OVERVIEW

[1] The applicant was involved in an automobile accident on April 2, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 ('Schedule')*[1].The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

BACKGROUND

[2] The applicant filed an application (18-006773/AABS) to determine whether she was entitled to income replacement benefits, and treatment plans for physiotherapy and a chronic pain assessment. An in-person hearing date was scheduled for May 23, 2019. The matter proceeded before Adjudicator Watt, who found that the applicant was not entitled to the benefits in dispute in his decision dated August 27, 2019. The application was dismissed. The applicant did not request a reconsideration of Adjudicator Watt's hearing decision and nor did she pursue an appeal.

[3] On July 9, 2021, the applicant filed a second application (21-009076/AABS) with the Tribunal. The second application included income replacement benefits, the minor injury guideline, and four treatment plans for physiotherapy. A case conference took place before Adjudicator Walsh on September 27, 2022. The issues were narrowed down to the four treatment plans for physiotherapy.

ISSUE IN DISPUTE

[4] The preliminary issue to be decided is:

1. Is the applicant's claim for the benefits set out below under "Substantive Issues" *res judicata* based on her prior Tribunal application regarding the same motor vehicle accident of April 2, 2016 (18-006773/AABS), which was dismissed by way of a decision released on August 27, 2019?

PARTIES' POSITIONS

[5] The respondent submitted that the applicant's current application should be dismissed because all of the criteria for *res judicata have* been met. Although the treatment plans in dispute have new dates on them, they are for the exact

[1] O. Reg 34/10 as amended

same services that were sought at the hearing in May 2019. The respondent argued that *res judicata* prevents a person from bringing multiple claims for the same relief by changing the grounds on which the claim is made. The application should not be permitted to proceed.

[6] The applicant submitted that issues that are being disputed in this application are new ones. There is new evidence that supports that the applicant needs more treatment due to her impairments. The applicant has yet to reach maximum medical recovery and should be entitled to physiotherapy.

ANALYSIS

Is the MIG issue res judicata?

[7] The doctrine of *res judicata* prevents a party from relitigating an issue that has already been decided. Four preconditions must be established before the adjudicator can determine whether to exercise their discretion to apply *res judicata*.[2] The factors are:

I. The parties must be the same in both actions;

II. The prior claim must be within the jurisdiction of the Court/Tribunal;

III. The prior adjudication must have been on the merits; and

IV. The prior decision must have been a final judgement.

[8] *Res judicata* can be waived in the following situations:

I. The first proceeding is tainted by fraud or dishonesty;

II. Fresh, new, evidence is submitted that was previously unavailable that would conclusively impeach the original results; or

III. When fairness dictates that the original result should not be binding in the new context.[3]

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[2] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII) at para 18 cited in *16-003909 v. Aviva Insurance Canada*, 2017 CanLII 59502 (ON LAT) at paras14, 15.
[3] *Toronto (City) v. CUPE Local 79*, 2003 SCC 63, para. 52, cited in *17-006816 v Cooperators*, 2018 CanLII 110950 para 5.

[9] I find that the preliminary issue of whether the treatment plans are reasonable and necessary was determined by the Tribunal's first decision and is *res judicata* for the following reasons.

[10] In my view, the four preconditions for *res judicata* are satisfied. The parties are the same in both proceedings. The prior claim was within the jurisdiction of the Tribunal. The decision in the first appeal is based on the merits. Adjudicator Watt heard testimony and reviewed the applicant's medical records. He found that the applicant attended physiotherapy sessions for over two years, but still complained of pain. He concluded that the applicant received maximum medical recovery from the physiotherapy sessions. He preferred the insurer examination reports of Dr. Joel Maser. Dr. Maser opined that the applicant did not require any further formal treatment.

[11] The Tribunal was of the view that the applicant did not demonstrate that further physiotherapy sessions would be reasonable and necessary for further recovery. The decision in the first appeal is a final judgment. The applicant did not file a reconsideration request and nor did she appeal the decision.

Should res judicata be waived based on new evidence?

[12] Any application to change a finding must be based on "fresh" new evidence that was not available at the arbitration or appeal, that would conclusively impeach the original results, or that there was an error in the order. The applicant submitted that there is new evidence and that more treatment is needed due to her ongoing impairments. The new medical records demonstrate that the applicant continues to experience ongoing impairments.

[13] The applicant submitted that she is still yet to reach maximum recovery with respect to her injuries. The applicant submitted that the new evidence was recently obtained; she was unable to obtain it before. However, no explanation was provided why this information was not available before. It is the responsibility of the applicant to put forth the reasons and evidence as to why the new evidence couldn't have been made available for the initial hearing. My review of the documents shows that these records are from 2020 to 2022, which are after the date that Adjudicator Watt issued his order.

[14] The respondent submitted that an application for a determination of catastrophic impairment does not show a material change in circumstances. It is an application and not a final determination. The respondent submitted that this should not be admitted into evidence.

[15] I find that the fresh evidence does not come to any new conclusions than the evidence that was put before Adjudicator Watt and nor does it show a material change in circumstances. My reasons are as follows.

Clinical notes and records ("CNRs") from Dr. Ullanda Niel

[16] The applicant submitted the CNRs from Dr. Niel in support of her case. The applicant did not direct me to specific references in the CNRs that would impeach the original results. The applicant must direct the adjudicator to the relevant evidence in support of her case and explicitly explain why *res judicata* should be waived. The applicant made submissions that she requires extensive treatment in order to reach maximum recovery. She is unable to go back to her pre-accident lifestyle due to her ongoing physical and psychological impairments. The accident continues to have an impact on her. I note that she continues to have pain and is receiving Lidocaine Ketamine infusions.

[17] In dispute are a series of treatment plans for physiotherapy. In the CNRs dated September 22, 2020, Dr. Niel noted "discontinue physio". What I infer from this is that Dr. Niel did not think that physiotherapy was beneficial. I note that the Lidocaine Ketamine injections provided the applicant with some relief with her pain.

[18] In my view, the CNRs of Dr. Niel 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. In fact, there is a letter dated September 26, 2022 which notes that the applicant has been complaining about pain along with other issues since the subject accident in 2016. The letter does not note any material changes in the applicant's condition. The CNRs do not support the need for additional physiotherapy.

[19] There is nothing in the CNRs that outright states that the applicant has not reached maximal medical recovery as alleged by the applicant in her submissions. The Tribunal cannot rely on a bald assertion. At the bare minimum, there should be some evidence to support the assertion. In my view, the CNRs do not warrant waiving the principle of *res judicata*.

[20] Although not binding on me, I am persuaded by the reasoning in *Rattan v. Aviva Insurance Company*, 2020 CanLII 1103677 (ON LAT). The decision is quite similar to the facts before me. In Rattan, Adjudicator Grant found that the doctrine of *res judicata* applied and that the issues had been previously determined on the merits. The same rationale applies here. The first decision determined that the applicant reached maximal medical recovery and that further

physiotherapy was not reasonable or necessary. There is no objective evidence that shows that her condition worsened to the extent that the disputed OCF-18s are reasonable and necessary. Therefore, I find that the doctrine of res judicata applies, and these issues have been previously determined on the merits.

OCF-19

[21] Both parties made submissions regarding an OCF-19. However, it was not submitted into evidence by the applicant. In any event, the submission of an application such as the OCF-19 does not suggest a material change in an individual's condition. A final determination would, which is not the case here.

CONCLUSION

[22] For the reasons set above, I find that the applicant is not entitled to the treatment plans or interest on any outstanding payment of the benefit. Her appeal is dismissed.

Released: December 1, 2022

Tavlin Kaur
Adjudicator