Citation: Lin v. Aviva General Insurance Company, 2023 ONLAT 20-004525/AABS

Licence Appeal Tribunal File Number: 20-004525/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:

Wa Fung Lin

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Christopher Evans**

APPEARANCES:

For the Applicant: Aline Avanessy, Counsel

For the Respondent: M. Jennifer Cosentino, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Wa Fung Lin, the applicant, was involved in an automobile accident on April 24, 2018, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by Aviva General Insurance Company, the respondent, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] A pickup truck exiting a gas station struck the applicant's car on the passenger side as he was driving. The applicant alleges that he suffers from chronic pain due to the accident.

[3] The applicant sought an income replacement benefit ("IRB"), which the respondent refused to pay because his injuries did not prevent him from working. The applicant also sought benefits for psychological and chiropractic treatment in three treatment plans (OCF-18s). The respondent refused to provide the benefits on the grounds that he sustained a predominantly minor injury as defined in s. 3 of the *Schedule*, and was therefore limited to $3,500.00 in medical and rehabilitation benefits and subject to treatment under the Minor Injury Guideline (the "MIG").

[4] The applicant seeks determinations that he has been entitled to an IRB since May 1, 2018, that he is entitled to the benefits in dispute with interest, and that he is entitled to an award under s. 10 of Regulation 664 because the respondent unreasonably withheld or delayed payment of benefits.

ISSUES

[5] The issues in dispute are:

1. Did the applicant sustain a predominantly minor injury subject to treatment under the $3,500.00 limit on medical and rehabilitation benefits?

2. Is the applicant entitled to an IRB in the amount of $400.00 per week from May 1, 2018 to date and ongoing?

3. Is the applicant entitled to the following medical benefits:

    a. $2,200.00 for psychological services, proposed by Perfect Choice Psychological Service Inc. in a treatment plan submitted on January 17, 2019;

b. $2,931.89 for chiropractic services, proposed by Prime Health Care Centre in a treatment plan submitted on December 11, 2018; and

c. $2,931.89 for chiropractic services, proposed by Prime Health Care Centre in a treatment plan submitted on June 25, 2019?

4. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

5. Is the applicant entitled to interest on overdue payments of benefits?

RESULT

[6] The applicant has not established that he sustained a non-minor injury and is therefore limited to $3,500.00 in medical and rehabilitation benefits.

[7] As the applicant has exhausted the benefits available to him, he is not entitled to the benefits in dispute, interest, or an award under s. 10 of Regulation 664.

PROCEDURAL ISSUE

[8] The respondent objects to the admission into evidence of the clinical notes and records ("CNRs") of Perfect Choice Psychological Service Inc., Prime Health Care Centre, and Dr. P. Pang from February 7, 2019 to March 3, 2020. I admit the CNRs of Perfect Choice Psychological Service Inc. and Prime Health Care Centre, but not those of Dr. Pang.

[9] The Case Conference Report and Order of August 28, 2020 provided that the applicant would produce "updated clinical notes and records from all relevant treating physicians" by December 3, 2020, and that the parties would produce any other documents they intended to present as evidence by May 6, 2021. An in-person hearing was scheduled from August 30 to September 2, 2021.

[10] On August 20, 2021, the applicant requested on consent that the hearing be adjourned and converted to a written hearing. In a Motion Order dated September 14, 2021, the request was granted. The Motion Order provided that the parties' evidence would be limited to those documents the parties had previously exchanged on or before May 6, 2021. A written hearing was scheduled for February 28, 2022.

[11] In a Notice of Motion dated January 24, 2022, the applicant requested an adjournment, an order requiring the respondent to provide the independent assessors' raw data, and an order permitting the applicant to enter the CNRs of

Perfect Choice Psychological Service Inc. and Prime Health Care Centre into evidence. The applicant explained that his counsel had inadvertently failed to follow up on his requests for the CNRs. When he discovered this mistake, he obtained the CNRs and served them on January 20, 2022.

[12] The respondent consented to the adjournment and agreed to request the independent assessors' raw data, but opposed the motion to enter the CNRs into evidence. At the motion hearing on March 2, 2022, the parties agreed to address the admissibility of the CNRs in their written submissions on the merits of the application. The written hearing was adjourned to May 31, 2022 and proceeded as scheduled.

[13] In his written submissions dated May 6, 2022, the applicant attached Dr. Pang's CNRs from February 7, 2019 to March 3, 2020. It appears that the applicant did not previously serve this document, nor was it discussed as part of the motion heard on March 2, 2022.

[14] The respondent submits that none of the CNRs should be admitted because the applicant served them after the May 6, 2021 deadline. In his submissions, the applicant only addresses the CNRs of Perfect Choice Psychological Service Inc. and Prime Health Care Centre, and not Dr. Pang's CNRs. He argues that the CNRs should be admitted because they are essential to proving his claims, the Tribunal cannot decide the application without them, and the respondent is not prejudiced because it had sufficient time to review them in advance of the May 20, 2022 deadline for its written submissions.

[15] Rule 9.4 of the *Common Rules of Practice & Procedure of the Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission* provides that if a party fails to comply with any Rules, directions, or orders with respect to document disclosure, that party may not rely on the document as evidence without the consent of the Tribunal.

[16] I admit the CNRs of Perfect Choice Psychological Service Inc. and Prime Health Care Centre. The applicant provided a reasonable explanation for his failure to produce them by the May 6, 2021 deadline, and produced them immediately after he discovered his mistake. I find that the respondent is not unduly prejudiced by admitting them. It received them five months before the deadline for its written submissions, and does not claim that it would have provided evidence in response, such as addenda to the reports of the independent assessors. At the March 2, 2022 motion hearing, it consented to an adjournment so it could obtain additional evidence at the applicant's request. I see no reason why this additional evidence should be admitted but not the CNRs.

[17] The applicant further argues that the respondent omitted to request the CNRs as a "tactical ploy" to "willfully blind" itself to the evidence demonstrating the merit of his claims. I do not accept this argument. It is the applicant's responsibility to produce the evidence he intends to rely on in the application.

[18] I decline to admit Dr. Pang's CNRs from February 7, 2019 to March 3, 2020. The applicant did not serve this document in advance of his written submissions, did not include it in his motion to admit the other CNRs, and did not discuss its admissibility in his written submissions. I find that the respondent would be prejudiced by permitting the applicant to enter a previously undisclosed document into evidence because it would provide insufficient notice of the case to meet.

DID THE APPLICANT SUSTAIN A PREDOMINANTLY MINOR INJURY SUBJECT TO TREATMENT UNDER THE $3,500.00 LIMIT ON MEDICAL AND REHABILITATION BENEFITS?

[19] I find that the applicant has not established that he sustained a non-minor injury and that he is therefore limited to $3,500.00 in medical and rehabilitation benefits.

[20] Section 18(1) of the *Schedule* provides that an insured person who sustains an impairment that is predominantly a minor injury is limited to $3,500.00 in medical and rehabilitation benefits. Minor injuries are subject to the treatment framework in the MIG.

[21] A minor injury is defined in s. 3 of the *Schedule* as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury."

[22] The onus is on the applicant to prove that his injuries are not subject to treatment under the $3,500.00 limit on benefits and the MIG: *Scarlett v Belair Insurance*, 2015 ONSC 3635 (Div Ct) at para 24.

[23] The applicant submits that he suffers from chronic pain, which falls outside the definition of minor injury in s. 3 of the *Schedule*. He argues that his chiropractor's CNRs demonstrate that he continued to experience pain in his neck and lower back more than six months after the accident, that an imaging report of February 26, 2019 identified lumbar pain or muscle spasm, and that Dr. R. Silverman, a psychologist who conducted an independent assessment, described him as experiencing constant pain in his lower back pain and intermittent pain in his right shoulder. He argues that the report of Dr. M. Fung, an independent assessor

who opined that he sustained minor injuries, should be given no weight because the respondent did not provide Dr. Fung any of his medical records.

[24] The respondent submits that the applicant does not suffer from chronic pain that would constitute a non-minor injury. It argues that the chiropractor's CNRs show that the applicant made significant improvement after a few months of treatment, that Dr. Silverman only recounted what the applicant reported to him, and that the applicant does not meet the diagnostic criteria for chronic pain syndrome in the sixth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides").

[25] For the applicant to prove that he sustained a non-minor injury, it is insufficient to establish only that he suffers from ongoing or recurring pain. These are classified as sequelae of his injuries from the accident. The applicant must prove that he suffers from chronic pain syndrome or pain that is continuous and of a severity that it causes suffering and distress accompanied by functional impairment or disability: *16-000438 v The Personal Insurance Company*, 2017 CanLII 59515 (ON LAT) at para 28.

[26] The applicant argues that in *Nirmal v Certas Direct Insurance Company*, 2021 CanLII 30753 (ON LAT) (Reconsideration), the Tribunal accepted that "chronic pain is a condition that persists for three to six months after an initial trigger or injury." If his argument is that any pain lasting more than three to six months constitutes a non-minor injury, I disagree. *Nirmal v Certas Direct Insurance Company* does not stand for that proposition. The passage quoted by the applicant is the Tribunal's summary of a party's submission regarding whether the cost of a chronic pain assessment is reasonable and necessary.

Chronic Pain Syndrome

[27] I find that the applicant's pain does not meet at least three of the six criteria necessary for a diagnosis of chronic pain syndrome under the AMA Guides. This is not a binding legal test, but a tool that may be useful for assessing chronic pain claims. The criteria are:

1. Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;

2. Excessive dependence on health care providers, spouse, or family;

3. Secondary physical deconditioning due to disuse and/or fear-avoidance of physical activity due to pain;

4. Withdrawal from social milieux, including work, recreation, or other social contacts;

5. Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs; and

6. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

[28] The applicant has provided no evidence that he meets any of these criteria except arguably the sixth given the mental health issues he reported to Dr. Silverman.

[29] The respondent is correct that Dr. Silverman's report only records the applicant's self-description of his pain as constant in his lumbar spine and intermittent in his right shoulder. Dr. Silverman did not opine that this pain amounted to chronic pain syndrome. The focus of Dr. Silverman's assessment was the applicant's psychological symptoms, not pain from his physical injuries.

Chronic Pain Causing Functional Impairment

[30] The applicant has not identified any evidence of functional impairment caused by his pain. To the contrary, he did not miss any work due to the accident and reported no change to Dr. Fung in his capacity to engage in activities of daily living and fulfill his homemaking duties.

[31] The CNRs of the applicant's chiropractor show that his pain largely resolved within 15 months of the accident. He received treatment from April 25, 2018 to July 25, 2019. According to an examination by Dr. P. Pirnia on June 25, 2019, he reported 90% improvement in his injuries, experienced mild tenderness on palpation of the lumbar region, and experienced shoulder pain at an intensity of two to five out of ten "only with activity or working." At subsequent appointments, he reported that his symptoms were the same or better.

Conclusion

[32] I find that the applicant has not established that he suffers from chronic pain syndrome or chronic pain causing functional impairment that would qualify as a non-minor injury.

IS THE APPLICANT ENTITLED TO AN IRB IN THE AMOUNT OF $400.00 PER WEEK FROM MAY 1, 2018 TO DATE AND ONGOING?

[33] I find that the applicant is not entitled to an IRB.

[34] The applicant was employed at the time of the accident. To be entitled to an IRB under s. 5(1)(i) of the *Schedule*, he must prove that as a result of and within 104 weeks after the accident, he suffered a substantial inability to perform the essential tasks of his employment. Section 6(1) provides that the applicant is entitled to receive an IRB up to 104 weeks after the accident for the period in which he suffered such a substantial inability, and after 104 weeks if he suffered a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training, or experience.

[35] The applicant did not miss work due to the accident. He returned to his regular duties the day after the accident. According to his income tax returns, his employment income was greater in 2018 than 2017, and greater again in 2019.

[36] The applicant argues that he returned to work out of necessity, that working aggravates his pain, and that it is vital to his recovery that he stop working. He submits that according to s. 11 of the *Schedule*, returning to work does not disentitle him to an IRB.

[37] The respondent argues that the applicant is not entitled to an IRB because he did not miss any work due to the accident, and because he did not submit a completed disability certificate (OCF-3) as required by s. 36(2) of the *Schedule*.

[38] I find that the applicant has not established that he is eligible for an IRB. Even if working exacerbates his pain, there is no evidence that he is impaired in his ability to perform the essential tasks of his employment. Consequently, he does not meet the test under s. 5(1)(i).

[39] The applicant is incorrect that s. 11 of the *Schedule* entitles him to an IRB despite returning to work. Section 11 provides that a person receiving an IRB may return to work during the first 104 weeks after the accident without affecting their entitlement to an IRB if they are unable to continue working as a result of the accident. Section 11 does not apply because the applicant did not receive and was not eligible to receive an IRB, and his accident-related injuries did not render him unable to continue working.

[40] In addition, I find that the applicant is ineligible for an IRB because he did not submit a disability certificate (OCF-3) as required by s. 36(2) of the *Schedule*.

Section 36(3) provides that an insured person is not entitled to an IRB for any period before they submit a completed disability certificate.

IS THE APPLICANT ENTITLED TO THE MEDICAL BENEFITS IN DISPUTE WITH INTEREST?

[41] As the applicant has not established that he sustained a non-minor injury, he is limited to $3,500.00 in medical and rehabilitation benefits. As he has exhausted that limit, he is not entitled to the medical benefits in dispute or interest.

IS THE APPLICANT ENTITLED TO AN AWARD?

[42] Under s. 10 of Regulation 664, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. As no benefits are payable, the applicant is not entitled to an award.

ORDER

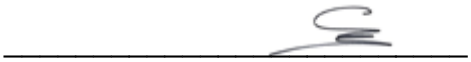
[43] The applicant is limited to $3,500.00 in medical and rehabilitation benefits.

[44] The applicant is not entitled to the benefits in dispute or interest.

[45] The applicant is not entitled to an award under s. 10 of Regulation 664.

[46] The application is dismissed.

Released: March 14, 2023



Christopher Evans
Adjudicator