



Citation: Boni v. CAA Insurance Company, 2023 ONLAT 20-007645/AABS

Licence Appeal Tribunal File Number: 20-007645/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:

Rocco Boni

Applicant

and

CAA Insurance Company

Respondent

DECISION

VICE-CHAIR: Tyler Moore

APPEARANCES:

For the Applicant: Rocco Boni, Applicant
Fabio Longo, Counsel
Kristy Kerwin, Counsel

For the Respondent: Daniel Ascemzi, AB Specialist
Geoffrey Keating, Counsel

Italian Interpreters: Carla Garagozzo, Carmelina Ramundo

Court Reporter: Prashanth Thambipillai

HEARD: by Videoconference: February 6, 7, 8, 9, 10, 2023

OVERVIEW

- [1] Rocco Boni, the applicant, was involved in an automobile accident on September 23, 2017, 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 the respondent, CAA Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “*Tribunal*”) for resolution of the dispute.
- [2] The applicant submitted an Application for Determination of Catastrophic Impairment (“OCF-19”) dated November 14, 2021, alleging that he sustained a catastrophic (“CAT”) impairment under criterion 8 of the *Schedule* as a result of the accident. The OCF-19 was completed by Dr. Tajedin Getahun, orthopaedic surgeon.
- [3] The respondent agreed that the applicant was catastrophically impaired following the accident, but it argued that the applicant’s impairments were not caused by the accident as the applicant was already markedly impaired in all four functional domains before the accident happened.

AGREED FACTS

- [4] In the year before the applicant’s accident, he experienced some anxiety and depression symptoms caused by his foreman’s bullying behaviour. He was also treated by psychiatrist, Dr. Krystyna Prutis for various conditions, including back, neck, right ankle, and bilateral knee pain.
- [5] For these impairments, the applicant was prescribed anti-depressant and sleep aids in the form of Escitalopram, Wellbutrin SR, and Trazodone. Following the accident, the applicant was also prescribed Seroquel, Fetzima, Abilify, Ativan, and the dosages of Escitalopram, Wellbutrin, and Trazodone were all increased.
- [6] The applicant was not referred to a psychiatrist in the three years before his accident. However, in August 2020, the applicant was referred to the Centre for Addiction and Mental Health by his family doctor, Dr. Anupama Walters.
- [7] On July 5, 2017, the applicant sustained a hand fracture for which he made a WSIB claim but did not receive any loss of earnings benefits. The applicant returned to work after his hand injury on modified duties.
- [8] The applicant’s last day of work prior to the accident was Friday September 22, 2017, or the day before the accident.

- [9] With respect to CAT determination, the applicant was assessed by psychiatrist, Dr. Zohar Waisman. Dr. Waisman concluded that the applicant suffered from three marked impairments in the areas of activities of daily living, social functioning, and adaptation. Dr. Waisman was of the opinion that but for the accident, the applicant would not have his psychological impairments.
- [10] The applicant was also assessed by psychiatrist, Dr. Eisen, at the request of the respondent. Dr. Eisen concluded that the applicant suffered marked impairments in all four functional domains. Dr. Eisen was of the opinion that the applicant likely had marked impairments in those four functional domains before the accident, so the impairments were not a result of the accident.

ISSUES

- [11] The issue in dispute is:
- i. Has the applicant sustained a catastrophic impairment, as defined by the *Schedule*, as a result of the accident?

RESULT

- [12] The applicant has sustained a catastrophic impairment, as defined by the *Schedule*, as a result of the accident.

ANALYSIS

Did the accident cause the applicant's CAT impairments?

- [13] I find that the applicant sustained at least three marked impairments as a result of the accident and is therefore CAT under criterion 8.
- [14] In order for the applicant to be determined to be CAT under criterion 8 of the *Schedule*, he must prove that it is more likely than not that the impairments he suffered because of the accident have resulted in three or more class 4 impairments (marked impairments), or one class 5 (extreme impairment) in any of the four areas of function outlined in Chapter 14 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (the "Guides"), due to a mental or behavioural disorder.
- [15] Impairments are classified using the word descriptions in Chapter 14 of the Guides on a five-category scale that ranges from no impairment to extreme impairment. These word descriptions are important because they assign meaning to each category. Therefore, it is not the category label itself (i.e. none,

mild, moderate, marked, extreme) that must be carefully assessed and analyzed, but the language that the Guides use – the verbal rating criteria – describing these classifications. Impairments are classified according to how much they impair a person’s useful functioning in the following four areas of function: activities of daily living (“ADLs”); social functioning (“SF”); concentration, pace and persistence (“CPP”); and adaptation (“AD”).

- [16] In this case, the parties agree that the applicant suffered at least three marked impairments after the accident. The question is really about causation because the respondent submits that the applicant actually suffered marked impairments in at least three functional domains even before the accident. If the applicant did not sustain his marked impairments as a result of an accident, he is not eligible for a CAT determination.
- [17] It is well established law that the appropriate test to determine causation in accident benefit cases is the “but for” test, which was confirmed by the Divisional Court in *Sabadash v. State Farm et al.*, 2019 ONSC 1121 CanLII (“*Sabadash*”). To satisfy this test, the applicant must prove on a balance of probabilities that “but for” the accident he would not have suffered the impairments which form the basis for his CAT application. *Sabadash* sets out that the existence of pre-existing medical issues does not negate an insurer’s liability, and that the accident need not be the only cause of the impairment but a necessary cause.
- [18] To assess causation, it is important that I analyze to what degree any accident-related impairment impacted the applicant’s ability to function. To do that, I must compare the applicant’s pre- and post-accident activities.
- [19] The applicant testified that he worked full-time, regular duties as a rodman for over 25 years until he fractured his wrist/hand in July 2017. Between July 2017 and the date of the accident, the applicant continued to work full-time hours, but his duties were modified to meet the physical limitations stemming from his wrist/hand fracture. His job as a rodman was physically demanding and involved setting/measuring/cutting rebar based on plan drawings. When the accident occurred, the applicant was only two and a half years away from being able to retire with a full union pension. He testified that he had no intention of leaving his job before the accident.
- [20] I heard testimony from the applicant, his family, and co-worker that family and friends have always been very important to the applicant. In the year leading up to the accident, he would get together with his family every Sunday for dinner and to socialize. The applicant loved to cook for others, and his family also had many traditions they participated in together throughout the year. For example,

they made tomato sauce, wine, cured meats, and hunted/fished together. The applicant was the one who often initiated these events. He regularly had friends and family over for a BBQ, to have a drink, or to share a meal. The applicant was described as outgoing, social, hardworking, and someone who went out of his way to help family and friends before the accident. He belonged to a social club that he would attend once a week, he would regularly go biking with his wife and/or son, and he enjoyed going to the local pool to swim. He took pride in his own appearance and work, and always provided for his family. He loved taking his son to music performances and recitals and attended all of his sporting events. Despite the fact that the applicant had some physical limitations before the accident, the testimony was persuasive that from a mental or behavioural perspective the applicant was not suffering from any marked impairment before the accident.

- [21] The respondent submits that the applicant has been suffering from longstanding pain and mental health issues that pre-date the accident. The respondent submits that in the year leading up to the accident the applicant was seeing a physiatrist regularly for his physical complaints, and he was being prescribed at least two anti-depressants/sleep aids. It asserts that his physical condition was deteriorating rapidly before the accident, and he could not have continued doing his job even if the accident had not occurred.
- [22] To support this position, the respondent referred to Dr. Walters' clinical notes dated September 1, 2016, where she discussed the possibility of the applicant going on short term disability from work. It was the applicant who refused to do so. Then, in September 2017, right before the accident, Dr. Prutis reported that the applicant had difficulty sitting/standing/bending/ ambulating, and his knees would give out. Dr. Prutis noted that the applicant could not perform his physically demanding duties on any consistent level and went so far as to recommend that the applicant go on long-term disability. While the respondent accepts that the applicant was technically working at the time of the accident, it submits that there was real concern over whether he could return to regular duties, which he had been medically cleared to do starting the Monday after the accident.
- [23] The respondent also submits that none of the applicant's lay witnesses really knew the applicant because they were not aware of any mental health issues he had before the accident. It argues that this undermines the reliability of their testimony on the applicant's impairments.

- [24] In assessing the applicant's pre- and post-accident function within the four domains I have considered his relationships with family and friends. I have accepted their testimony as credible and reliable, and found that their testimony consistently echoed each other's: that the applicant became a different person after the accident.
- [25] Before the accident, the applicant did everything with and for his family, friends, and co-workers. He was described as funny, social, and liked to be the centre of attention entertaining everyone else. After the accident, however, he was described as always being frustrated/angry and that he could have outbursts without any apparent trigger. For example, he became withdrawn and could no longer cope with noise or even very minor stressors. He stopped being active with his son, he no longer went fishing or hunting with his extended family, he no longer participated in the weekly family gatherings on Sundays. He was always fighting with his wife and son, he had no motivation and poor memory, he would not travel, he needed to be reminded of everything – even taking notes from his wife to his family doctor. Further, he was argumentative with his healthcare providers, he did not cook, he did not look after his prized lawn or garden, he spent his days sitting around watching the same movies over and over again, and he relied on his wife to look after all of the household finances and manage his appointments.
- [26] Before the accident, the applicant would shower and brush his teeth every day and took pride in his appearance. Post-accident, he has had to be reminded to shower, brush his teeth, and change his clothing.
- [27] I have given significant weight to the reports and testimony of Dr. Eisen and Dr. Walters because the respondent's position turns a great deal on Dr. Eisen's findings. Dr. Eisen testified that he relied heavily on the CPP disability initial medical report and disability tax credit forms completed by Dr. Walters to support his findings. He also testified that he was also under the impression that the applicant was not working at the time of the accident. The applicant, however, was in fact working full-time on modified duties until September 23, 2017. I don't see how this discrepancy would not impact any assessment of the applicant's mental and behavioural pre-accident function.
- [28] Dr. Walters first completed a disability tax credit form in October 2019. She testified that she had not completed the form before the accident because she did not feel it was applicable to the applicant at that time. He was working full-time despite his physical complaints, and what Dr. Walters described as transient depression and anxiety.

- [29] Dr. Walters completed the applicant's initial CPP disability medical report in December 2018. Again, this was after the accident. Dr. Walters testified that she did not recommend the applicant apply for CPP disability benefits before the accident because she did not believe that he met the test for entitlement. Dr. Walters testified that she used the year 2015 as the year she started treating the applicant for his main medical conditions on the CPP disability application because that is when the applicant became her patient. She also testified that she was not asked on those forms about the applicant's function.
- [30] On the disability tax credit form Dr. Walters completed in October 2019, she listed 2016 because that was when the applicant's symptoms of mental health first appeared. Again, there was no consideration of function. I am also persuaded by Dr. Walters' testimony that it would be a mistake to equate the duration of the applicant's mental health diagnoses with his mental health functioning. Dr. Walters testified that based on her interactions with the applicant both pre- and post-accident, there was a progressive and significant worsening of his mental health functioning after the accident. That is why she completed the disability tax credit form and the CPP disability applications when she did. I accept this.
- [31] Dr. Walters testified that she has no training in assessing or interpreting the *Guides* impairment rating system. She was the first to admit that her definition of incapacity or a marked impairment was not necessarily in line with the *Guides*.
- [32] Dr. Walters affirmed that there was no information in her clinical notes and records from 2016 or 2017 that specifically related to the applicant's function. Specifically, on the disability tax credit form, Dr. Walters testified that the year 2016 was not suggestive that the applicant's was functionally restricted, but rather that was the year that his depressive symptoms really began. Dr. Walters testified that, if anything, the applicant was coping with the medications he was prescribed and functionally well in the year leading up to the accident. She believed that the accident itself was the event that caused a significant deterioration in the applicant's overall level of functioning, both physically and mentally/behaviourally. Any functional restrictions prior to the accident were of a physical nature only. She also clarified that when short term disability was discussed with the applicant prior to the accident, it was only meant to give the applicant a short break from work to rest his back.
- [33] I am persuaded by Dr. Walters' comment that she did not suggest or assist with applications for CPP disability benefits or the disability tax credit before the accident because she did not feel that the applicant met the eligibility criteria until

after the accident occurred. That is when his functional status from a mental and behavioural perspective really deteriorated. From a strictly mental health and behavioural perspective, Dr. Walter's believed the applicant could have continued working if the accident had not occurred.

- [34] The applicant did not suffer from panic attacks before the accident. He was able to interact with doctors, friends, family, and the medical system. Yes, he had difficulty with his foreman who was pressuring him at work, but I accept the testimony of the applicant's witness who worked with the same foreman and crew that they all had issues with the foreman. I further accept that once work was over for the day, however, they were all friends and engaged outside of work. While the applicant's witnesses may not have been aware that he had pre-accident mental health issues, they each testified that he was social, able to participate in day-to-day activities, and continued to attend work each day leading up to the accident. The fact that they were unaware of the applicant's mental health issues pre-accident supports that he retained a high level of pre-accident function.
- [35] For these reasons, I prefer the testimony of the applicant's family and friends, as well as the clinical notes and testimony of his treating family doctor when assessing the applicant's pre- and post-accident mental and behavioural functioning. Collectively, their evidence supports that the applicant's pre-accident functioning from a mental and behavioural perspective did not meet the criteria for marked impairment in at least three of the four functional domains.
- [36] I also found the reports and testimony of Dr. Waisman to be particularly persuasive. Dr. Waisman explained that the applicant's accident was the trigger that amplified his pre-existing conditions and activated vulnerabilities that he already had. According to Dr. Waisman, the fact that the applicant was able to work full-time leading up to the accident is indicative of a pre-accident ability to concentrate and focus in an environment like construction jobsites where safety was a real concern. The applicant was also able to persist at tasks to the point of completion, which Dr. Waisman testified would not be indicative of an individual who had class four marked impairments related to a mental or behavioural disorder prior to the accident.
- [37] Before the accident the applicant was able to initiate and sustain tasks regularly both at work and at home, he was independent with his self-care, he initiated activities, and was social. He was able to maintain relationships with family/friends/co-workers, participate and engage in family traditions such as wine making, cooking, swimming, biking, hunting, fishing, gardening, and

performing household maintenance tasks. He continued to engage socially, he was able to complete all activities of daily living without support, and he was able to concentrate on tasks to see them through from beginning to end. Even more importantly, he was working full-time right up to the date of the accident.

[38] Accordingly, I am satisfied that there was a significant decline in the applicant's function and tolerances that would not have occurred but for the accident.

ORDER

[39] The applicant sustained a catastrophic impairment under criterion 8 as defined by the *Schedule* as a result of the accident.

Released: February 27, 2023

**Tyler Moore
Vice-Chair**