Citation: Osei v. Aviva Insurance Company, 2023 ONLAT 22-000783/AABS

Licence Appeal Tribunal File Number: 22-000783/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:

Emelia Osei

Applicant

and

Aviva Insurance Company

Respondent

DECISION

PANEL: **Jeremy A. Roberts & Christopher Evans**

APPEARANCES:

For the Applicant:	Emelia Osei, Applicant Frank Mercurio, Paralegal
For the Respondent:	Jason Brumwell, Adjuster Surina Sud, Counsel
Court Reporter:	Derek Makse
Interpreter:	Jennifer Abbey, Twi Interpreter

HEARD: by Videoconference: June 27-29, 2023

OVERVIEW

[1] Emilia Osei, the applicant, was involved in an automobile accident on December 13, 2019, 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, Aviva Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 Minor Injury Guideline ("MIG") limit? Note: The parties agree the MIG limits have been exhausted.

ii. Is the applicant entitled to an income replacement benefit ("IRB") in the amount of $286.00 per week from August 7, 2020 to date and ongoing?

iii. Is the applicant entitled to $2,748.15 for chiropractic treatment services, proposed by Keele Finch Chiropractic Centre in a treatment plan/OCF-18 submitted on May 6, 2020 and denied on August 7, 2020?

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

v. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] The applicant sustained predominantly minor injuries and is therefore subject to the $3,500.00 MIG limit on medical and rehabilitation benefits.

[4] The applicant is not entitled to the IRB, the proposed chiropractic treatment, interest, or an award.

PROCEDURAL ISSUES

Motion to un-redact parts of the surveillance reports

[5] At the start of the hearing, the applicant moved for an order requiring the respondent to serve unredacted copies of the surveillance reports. The respondent had produced several surveillance reports, with the first several pages of each one redacted on the basis that they were protected by litigation privilege. The applicant had previously brought this issue forward through a Notice of Motion submitted to the Tribunal on June 13, 2023. On June 20, 2023, the Tribunal ruled that "it is open to the applicant to submit this request to the hearing adjudicator, who is in a better position to consider this request".

[6] The applicant argued that the respondent had not adequately explained why certain portions of the surveillance report under the subheading of "Investigation Summary" were redacted, given that information contained in a summary would not normally be redacted. The respondent disagreed, arguing that the redacted portions were covered by litigation privilege because they were in a letter between the insurer and the surveillance company (as evidenced by a signature block). However, it did concede that the "Investigation Summary" section did not contain any privileged information.

[7] We granted the motion in part. The Motion Order clearly left the issue open for the hearing adjudicators to consider. Litigation privilege attaches to documents created for the dominant purpose of litigation: *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 59-60. While the correspondence between the insurer and the surveillance company would generally be covered by litigation privilege, the "Investigation Summary" sections of the reports are not privileged because the respondent conceded that they are summaries of non-privileged information in the body of each report. We consequently ordered the respondent to un-redact the "Investigation Summary" sections.

Objection to the applicant's calling Devon Forson as a witness

[8] The respondent objected to the applicant's calling her son, Devon Forson, as a witness. It argued that the applicant had never provided a final witness list or summary of Mr. Forson's anticipated testimony in breach of Rule 9.1 of the *Common Rules of Practice & Procedure of the Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission*. It argued that allowing him to testify would be prejudicial as it would not have had proper time to prepare. The applicant argued that Mr. Forson was listed as a witness in the Case Conference Report and Order, which clearly indicated that he would testify.

[9] We agreed with the applicant. The Case Conference Report and Order put the respondent on notice that the applicant would call Mr. Forson as a witness and did not require the parties to provide witness lists or summaries of their witnesses' anticipated testimony in advance of the hearing. Because he testified on the second day of the hearing, we ordered the applicant to provide a summary of his anticipated testimony by the end of the first day of the hearing.

ANALYSIS

The applicant's injuries are predominantly minor and fall within the MIG

[10] We find that the applicant's injuries are predominantly minor and subject to the MIG limit because the applicant has failed to prove that they cause ongoing functional impairments due to pain.

[11] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured person sustains impairments that are predominantly minor injuries. Section 3(1) defines a "minor injury" 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." The burden is on the applicant to show, on a balance of probabilities, that her injuries fall outside of the MIG.

[12] The applicant does not allege that she suffered injuries other than strains or sprains, which are minor injuries as defined at s. 3 of the *Schedule*. She argues that she suffers from ongoing pain in her back, neck, and shoulders, as documented in several clinical notes of her family physician, Dr. Beharry. The applicant and her son testified that she wakes up in the middle of the night due to this pain, and that she relies on her children to help her with household tasks, such as doing the laundry and grocery shopping.

[13] The respondent argues that the applicant suffered only soft-tissue injuries in the accident. It notes that the only medical diagnosis of the applicant's injuries is a lumbar sprain, as diagnosed by Dr. Tse, a rheumatologist who conducted an independent assessment. It argues that the applicant has received adequate treatment for this injury under the MIG and its $3,500.00 limit on benefits. Further, it argues that the applicant agreed on cross-examination that the types of pain she experiences date to a previous accident in 2017.

[14] Chronic pain constitutes a non-minor injury if it is 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.

[15] The applicant must prove not just that she experiences ongoing pain, but that this pain causes functional impairment. We find that she has not done so. The only evidence of functional impairment is the testimony of the applicant and her son. They only commented briefly that the applicant needs assistance with household tasks. They did not detail what tasks the applicant requires assistance with and to what extent. The evidence shows that the applicant is not completely unable to perform these activities without assistance. The applicant testified that she is still able to perform tasks such as shop for groceries and do laundry to some extent, and the surveillance evidence shows her performing such tasks with and without a family member.

[16] We find that the applicant has not established that she sustained a non-minor injury that would entitle her to more than $3,500.00 in medical and rehabilitation benefits.

The applicant is not entitled to an IRB

[17] We find that the applicant has not proved that she meets the pre- or post-104 tests for IRB in the period in dispute.

[18] Section 5(1)(1)(ii) of the *Schedule* provides that an insurer shall pay an IRB to an insured person who sustains an impairment as a result of an accident if they were receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident, were at least 16 years old, and as a result of the accident and within 104 weeks after the accident, suffered a substantial inability to perform the essential tasks of the employment in which they spent the most time during the 52 weeks before the accident. Sections 6(1) and (2)(b) provide that the insured person is entitled to receive an IRB up to 104 weeks after the accident for the period in which they suffered such a substantial inability, and after 104 weeks if they suffered a complete inability to engage in any employment or self-employment for which they are reasonably suited by education, training, or experience. For the applicant in this case, the post-104 period began on December 13, 2021.

[19] Prior to the accident, the applicant worked at a warehouse as a cleaner. She testified that her essential tasks involved prolonged standing, walking, lifting, and cleaning. She was receiving Employment Insurance benefits at the time of the accident after having undergone surgery in October 2019. After the accident, she was paid an IRB from January 27, 2020 to August 7, 2020. The insurer discontinued the IRB on August 8, 2020 after commissioning an independent assessment from Dr. Tse.

[20] The applicant argues that she could not return to work due to ongoing pain from her injuries. She also disputes Dr. Tse's opinion and alleges that the respondent inappropriately instructed him to conclude that she sustained minor injuries in the Independent Examination Referral Form.

[21] The respondent argues that it paid an IRB for more than the 9 to 12 weeks of expected disability listed on the Disability Certificate/OCF-3 completed by Dr. Awenus. In discontinuing the benefit, it relied on Dr. Tse's opinion that the applicant no longer suffered a substantial inability to perform the essential tasks of her pre-accident employment. It argues that this conclusion is corroborated by video surveillance that shows the applicant walking, jogging, and lifting groceries and laundry. It also strongly denied that it improperly instructed Dr. Tse what to conclude, pointing out that it is common practice for the insurer to provide its reason for ordering an independent assessment to the assessment facility, which in this case was its belief that the applicant sustained minor injuries. Dr. Tse confirmed that he never received the Independent Examination Referral Form or any instructions about what to conclude.

[22] We find that the applicant has not proved that she suffered a substantial inability to complete the essential tasks of her pre-accident employment during the pre-104-week period in dispute. The only evidence she provided on this point was her testimony that she was unable to maintain her job as a packager at a warehouse after the accident. Clinical notes and records of the family doctor were provided; however, these were of little use because they were not contemporaneous with the period in dispute, nor did they speak to her functional impairments. There were no visits to the family doctor (or other medical practitioner) until 15 months after the IRB was terminated in August 2020. In her testimony, the applicant did not provide details about which specific tasks she was unable to perform and how her accident-related injuries impaired her ability to perform them. The surveillance evidence shows that she was able to lift, stand and walk for prolonged periods without assistance at least some of the time. The applicant's assertion that she cannot work does not meet her onus on its own.

[23] We also disagree that the respondent instructed Dr. Tse on what to conclude in his assessment. The Independent Examination Referral Form only stated the respondent's reasons for commissioning the assessment, and Dr. Tse testified that the assessment facility did not provide it to him. Even if we did find merit to this allegation, discrediting Dr. Tse's assessment does not meet the applicant's burden of proof because it does not positively demonstrate that she meets the tests for an IRB.

[24] Given that we find the applicant did not suffer a substantial inability to perform the essential duties of her employment during the period in dispute, and there is no evidence that her ability to work changed significantly after the 104-week mark, it

follows that she does not meet the "complete inability" test for post-104 week entitlement.

[25] We find that the applicant is not entitled to a pre-104 week IRB for the period in dispute or a post-104 week IRB.

The applicant is not entitled to the treatment plan for chiropractic services

[26] As we find that the applicant remains within the MIG, she has exhausted the MIG limit, and the treatment plan in dispute proposes treatment outside of the MIG, it follows that she is not entitled to this treatment plan.

Interest

[27] Section 51 of the *Schedule* provides that an insurer shall pay interest on overdue payments of benefits. No interest is owed as we find that no benefits are payable.

The applicant is not entitled to an award

[28] Section 10 of Regulation 664 provides that in addition to awarding the benefits and interest to which an insured person is entitled under the *Schedule*, the Tribunal may award a lump sum of up to 50 percent of the amount to which the person was entitled at the time of the award with interest if the insurer unreasonably withheld or delayed payments.

[29] As the applicant is not entitled to the benefits in dispute, she is not entitled to an award.

ORDER

[30] We order the following:

i. The applicant sustained predominantly minor injuries subject to the $3,500.00 MIG limit on medical and rehabilitation benefits.

ii. The applicant is not entitled to an IRB.

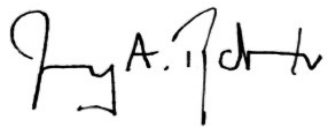
iii. The applicant is not entitled to the treatment plan for chiropractic services.

iv. The applicant is not entitled to interest.

v. The applicant is not entitled to an award.

vi. The application is dismissed.

Released: August 24, 2023



Jeremy A. Roberts
Vice-Chair

Christopher Evans
Adjudicator