Citation: Bercal v. Aviva Insurance Company, 2023 ONLAT 21-013750/AABS

Licence Appeal Tribunal File Number: 21-013750/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:

Bercal Soledad

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Christopher Evans**

APPEARANCES:

For the Applicant: Daniel D'Urzo, Counsel
Aaron Zakaria, Counsel

For the Respondent: Geoffrey Keating, Counsel

Reporter: Charlotte St. Croix

HEARD: by Videoconference: May 29-30, 2023

OVERVIEW

[1] Soledad Bercal, the applicant, was involved in an automobile accident on February 6, 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 Aviva Insurance Company, the respondent, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] At issue is whether the applicant is entitled to an income replacement benefit ("IRB") of $400 per week from November 18, 2019 to February 6, 2023, the cost of psychological and chronic pain assessments, interest, and an award under s. 10 of Regulation 664: *Automobile Insurance* because the respondent unreasonably withheld or delayed payment of benefits.

ISSUES

[3] The issues in dispute are:

1. Did the applicant sustain a predominantly minor injury subject to the $3,500 limit on medical and rehabilitation benefits?

2. Is the applicant entitled to an IRB in the amount of $400.00 per week from November 18, 2019 to February 6, 2023?

3. Is the applicant entitled to $2,144.93 for a psychological assessment, proposed by Dr. Eugene Hewchuk in a treatment plan/OCF-18 dated January 14, 2022?

4. Is the applicant entitled to $2,200.00 for a chronic pain assessment, proposed by Dr. Michael Gofeld in a treatment plan/OCF-18 dated May 11, 2022?

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

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

RESULT

[4] The applicant is entitled to an IRB with interest.

[5] The applicant suffers from chronic pain causing functional impairment. As this is a non-minor injury, she is entitled to $65,000 in medical and rehabilitation benefits.

[6] The applicant is entitled to the cost of the chronic pain assessment with interest, but not the psychological assessment.

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

THE APPLICANT IS ENTITLED TO AN IRB

[8] The applicant was employed for roughly 28 years at an automobile parts factory. She had two tasks: (1) packing parts in boxes and moving the boxes with a pump truck, and (2) assembling car roofs. She worked standing up for eight-hour shifts. Packing required her to bend over and lift parts and boxes.

[9] The applicant did not return to work after the accident. In September 2019, she approached her employer about returning on modified duties but was told there was no such work.

[10] The respondent paid an IRB until November 18, 2019, when it terminated the benefit after commissioning independent assessments.

[11] Section 5(1)(i) of the *Schedule* provides that the applicant must, as a result of and within 104 weeks after the accident, have suffered a substantial inability to perform the essential tasks of her employment. Section 6(1) provides that she is entitled to receive an IRB up to 104 weeks after the accident for the period in which she suffered such a substantial inability, and after 104 weeks if she suffered a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training, or experience.

[12] The applicant was 65 years old when the accident occurred. Section 9 of the *Schedule* provides that she would be entitled to an IRB for four years at most, with the amount of the benefit reduced each year according to the table set out in s. 9(1)(b).

[13] The applicant argues that she suffers from continuing neck and back pain due to the accident, and that this pain prevents her from doing her job or any other job that would require prolonged standing or maintaining a posture. She relies on assessments conducted by Dr. M. Gofeld, an anaesthesiologist and chronic pain physician, and by Dr. E. Hewchuk, a psychologist.

[14] The respondent argues that the applicant has not suffered from ongoing pain since the accident, that any pain she does experience is the result of pre-existing conditions unrelated to the accident, and that she has not proven that her injuries prevented her from working. It relies on independent assessments conducted by Dr. C. Gallimore, an orthopaedic surgeon, Dr. K. McCutcheon and Dr. G. Lau, psychologists, and Dr. F. Loritz, a general practitioner.

The applicant suffers from ongoing pain

[15] The applicant testified that she suffers from neck and lower-back pain due to the accident. She also has two conditions unrelated to the accident: degenerative disc disease and osteoarthritis. She testified that while she had some neck, back, and shoulder pain before the accident, it was manageable and did not prevent her from working. She did not clearly remember many events over the four and a half years since the accident. However, I am satisfied that her memory is reliable on the basic point that she has experienced ongoing neck and back pain since the accident.

[16] The applicant reported experiencing neck and back pain to her family doctors and the assessors at various times since the accident. In particular:

1. Dr. Gallimore conducted his assessment on October 22, 2019, eight and a half months after the accident. He found that the applicant suffered from neck and back pain due to her injuries.

2. The applicant reported neck and/or back pain to her family doctors on February 7 and 13, March 4, and September 5, 2019, in October 2021, on March 15, 2022, and on March 31, 2023.

3. Dr. Gofeld conducted his assessment on December 22, 2022. The applicant reported neck and lower-back pain, among other things, which he corroborated with a physical examination and other measures. He opined that the applicant suffered from chronic pain.

[17] The respondent submits that the applicant has not had continuous neck and back pain. It argues that she only reported pain to her family doctors sporadically after the accident despite seeing them for other issues. Most notably, she did not report pain at any appointments between September 2019 and October 2021. The respondent argues that she agreed on cross-examination that she would have reported pain had she been feeling it.

[18] I do not accept this submission for the following reasons:

1. The applicant had degenerative disc disease and osteoarthritis over the same period even though she did not consistently report pain to her family doctors. These conditions were confirmed by diagnostic imaging conducted on December 21, 2011, February 12, 2019, and October 18, 2021. Dr. Loritz opined that the progression of these conditions was the cause of her lower-back pain.

2. The more likely explanation is that when pain became a constant presence in the applicant's life, she did not see the need to continually report it to her doctor. When she saw her family doctors for other issues such her diabetes, her baseline neck and back pain were not relevant and likely did not come up.

3. The applicant did not clearly agree on cross-examination that she would have reported pain to her family doctors if she had been feeling it. English is not her first language and she had difficulty communicating with counsel. I took her to be saying that she had reported pain to her family doctors, not that she had reported pain only when she was feeling it.

The applicant's injuries are a cause of her pain

[19] It is common ground that the applicant's degenerative disc disease and osteoarthritis contribute to her neck and back pain. However, she need only prove that her accident-related injuries are a necessary cause of her impairment, not the sole cause: *Sabadash v State Farm et al.*, 2019 ONSC 1121 (Div Ct) at para 39. I find that the applicant's neck and back injuries meet this test for the following reasons.

[20] The applicant testified that while she had pain before the accident, this pain was exacerbated by the accident to the point that she could no longer work. I accept that her memory is reliable on this basic point.

[21] There is conflicting expert evidence on causation. Dr. Gofeld opined that the applicant experienced neck and back pain from her pre-existing conditions, but her injuries from the accident also contribute to her current level of pain. Dr. Loritz opined that the applicant's pain was solely caused by her pre-existing conditions. The applicant reported to him that her neck pain had eased to its pre-accident level, and he attributed the applicant's increased lower-back pain to the progression of her degenerative disc disease and osteoarthritis. I prefer Dr. Gofeld's opinion for the following reasons:

1. Dr. Gofeld specializes in treating chronic pain and has published extensively in this field. Dr. Loritz may have experience treating chronic pain, but he does not have the same demonstrated expertise.

2. Dr. Gofeld corroborated the applicant's reported neck pain. He had her complete a pain diagram and found that it matched the description she gave when he took her history. He applied a facet joint loading test that specifically identified pain at two vertebrae in her neck. He testified that patients magnifying their symptoms usually report feeling tender all over, and that pain in these specific facet joints explained her complaint that pain would radiate from her neck to her shoulder. In his view, a layperson would not have the knowledge to describe those specific symptoms if they were not real.

3. Dr. Gofeld's physical examination of the applicant's neck and back was more thorough than Dr. Loritz's, which appears to have consisted only of inspecting the spine and testing range of motion and strength.

The applicant's pain prevented her from working

[22] I find that the applicant meets both the pre- and post-104 week tests for an IRB.

[23] The applicant had a physically demanding job. Its essential tasks included standing for eight-hour shifts, bending to pack parts in boxes, and lifting heavy objects.

[24] The applicant was unable to work after the accident and was paid an IRB for approximately nine months. She testified that her neck and back pain continued to prevent her from returning to work. I accept that her memory is reliable on this basic point, and that she is telling the truth. Before the respondent terminated the IRB, she attempted to return to work on modified duties, but was refused because no such work was available. This indicates that she sincerely did want to keep working. She candidly told the assessors (other than Dr. Hewchuk, whose report I discuss below) and agreed on cross-examination that pain did not prevent her from carrying out her pre-accident activities of daily living. Dr. Gofeld corroborated her pain complaints and found them to be credible.

[25] The applicant's education, training, and experience imply that she was reasonably suited for work similar to her job at the automobile parts factory, with comparable physical demands such as prolonged standing and repetitive bending and lifting. The applicant completed high school in the Philippines and one year of a college program in early childhood education. She worked at the

automobile parts factory for most of her career. Her other work experience included working at an electronics factory for three years, as a domestic helper for two years, and as a nanny for two or three years.

[26] I conclude that the applicant was unable to perform her duties at the automobile parts factory and could not have performed other work for which she was reasonably suited.

[27] The respondent argues that the applicant would not have worked during the COVID-19 pandemic even if she had not been injured. She testified that the automobile parts factory closed at the start of the pandemic and she stopped looking for work, and that she was afraid to go out until around the end of 2022. The applicant argues that these facts are irrelevant to the tests for an IRB. I agree. The applicant is entitled to an IRB because she was unable to work due to her injuries. The fact that the pandemic might otherwise have prevented her from working for some time does not disentitle her to this benefit.

Expert evidence regarding whether the applicant meets the tests for an IRB

[28] The respondent argues that the applicant must provide expert evidence to meet her burden of proof, citing *General Accident Assurance Co. of Canada v Dominic Violi*, 2000 ONFSCDRS 177 (FSCO App) (CanLII). It argues that Dr. Gofeld's report did not comment on the applicant's ability to work, and Dr. Hewchuk's report made only a vague, unsupported statement that she met the pre-104 week test for an IRB. The applicant argues that Dr. Gallimore's findings about her functional abilities prove that she meets the tests for an IRB even though he opined that she was substantially able to perform the essential tasks of her job.

[29] I disagree that the applicant cannot satisfy her burden on proof without an expert opinion stating that she meets the tests for an IRB. I see nothing in *Violi* that supports that proposition. Whether the applicant meets these tests is a legal question, not a medical question.

[30] I do not accept Dr. Gallimore's opinion that the applicant was substantially able to perform the essential tasks of her job. He found that the applicant was impaired in her ability to lift heavy objects and maintain a prolonged posture. He noted that the applicant's job required her to move her arms quickly and that she would occasionally sit, then concluded that she should be able to return to her usual work tasks. He did not state whether he understood lifting heavy objects and maintaining a prolonged posture to be essential job tasks, or whether the applicant would be able to perform those tasks given the impairments he

identified. Had he turned his mind to those issues, he might have reached a different conclusion.

Conclusion

[31] I find that the applicant is entitled to an IRB from November 18, 2019 to February 6, 2023 in accordance with s. 9(1)(b) of the *Schedule*. I do not understand the amount of the IRB to be in dispute given that the respondent paid an IRB for approximately nine months and the parties did not address this issue in their submissions.

THE APPLICANT SUSTAINED A NON-MINOR INJURY

[32] 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 in medical and rehabilitation benefits. Minor injuries are subject to the treatment framework in the Minor Injury Guideline ("MIG"). 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.

[33] Section 18(2) of the *Schedule* provides that an insured person with a predominantly minor injury is not subject to the $3,500 limit on benefits if they have a documented pre-existing medical condition that will prevent them from achieving maximal recovery from the minor injury if they are subject to the limit or limited to the goods and services authorized under the MIG.

[34] The applicant alleges that she suffers from two non-minor injuries: chronic pain causing functional impairment and a psychological impairment. She also alleges that her degenerative disc disease and osteoarthritis are pre-existing conditions within the meaning of s. 18(2) of the *Schedule*.

[35] The respondent argues that the applicant sustained soft-tissue injuries that fall within the definition of minor injury, that she does not suffer from chronic pain or a psychological impairment, and that although her pre-existing conditions might have delayed her recovery from her accident-related injuries, they did not prevent her from achieving maximal recovery subject to the $3,500 limit on benefits and the goods and services authorized under the MIG.

Mootness

[36] The respondent did not deny the assessments in dispute on the grounds that she sustained a predominantly minor injury. Section 38(9) of the *Schedule* provides

that if an insurer takes that position, it must advise the insured person in the notice denying benefits. Section 38(11)1 provides that if the insurer fails to do so, then it may not deny the assessments on that basis. The respondent concedes that it may not do so in this case. It argues only that the proposed assessments are not reasonable and necessary.

[37] The onus is on the applicant to establish that she is entitled to the assessments. To do that here, she need not prove that she is entitled to more than $3,500 in medical and rehabilitation benefits. This issue is moot because deciding it will not resolve whether she is entitled to the assessments: *Borowski v. Canada (Attorney General*), [1989] 1 SCR 342 at 353. The applicant still asks that I decide it. The respondent does not oppose this request.

[38] I have exercised my discretion to consider this issue for two reasons:

1. There is a continuing adversarial relationship: *Borowski* at 358-359. The respondent takes the position that the applicant is limited to $3,500 in benefits even though s. 38(11) prevents it from making that argument here. Both parties considered this to be a live issue and fully canvassed it. Deciding it is useful to the parties because it will establish whether the applicant is entitled to more than $3,500 in medical and rehabilitation benefits going forward.

2. Deciding the issue will promote adjudicative economy: *Borowski* at 360. As it is not the only issue, declining to decide it would not obviate the need for the application. It would not be in the parties' or the Tribunals' interest to require the applicant to bring another application to decide this issue if and when future benefits are denied because the $3,500 limit applies. This issue turns on the applicant's injuries, and not the specific goods and services that were denied.

The applicant suffers from chronic pain causing functional impairment

[39] Pain that is continuous and of a severity that it causes suffering and distress accompanied by functional impairment or disability falls outside the definition of non-minor injury in s. 3 of the *Schedule*: *16-000438 v The Personal Insurance Company*, 2017 CanLII 59515 (ON LAT) at para 28.

[40] The applicant alleges that she suffers from chronic pain in her neck and shoulder, lower back, and right leg due to the accident. She submits that this pain causes two types of functional impairment. First, she was unable to return to work. Second, on bad days her right leg pain interferes with her ability to walk.

[41] The respondent denies that the applicant suffers from continuous pain, that the accident caused any continuing pain, and that pain prevented her from working.

[42] I have found that the applicant's pain from her injuries prevented her from working after the accident. This is continuous pain causing functional impairment, and is therefore a non-minor injury.

Conclusion

[43] As the applicant sustained a non-minor injury, she is entitled to $65,000 in medical and rehabilitation benefits under s. 18(3)(a) of the *Schedule*. I therefore need not consider whether she sustained a psychological impairment or whether she has pre-existing conditions within the meaning of s. 18(2).

THE APPLICANT IS ENTITLED TO THE COST OF THE CHRONIC PAIN ASSESSMENT

[44] The *Schedule* provides that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for the medical and rehabilitation benefits enumerated in ss. 15 and 16, including the costs of assessments prepared in connection with those benefits. The onus is on the applicant to prove that the proposed services are reasonable and necessary.

[45] The applicant requested $2,200.00 for a chronic pain assessment in a treatment plan by Dr. Gofeld dated May 11, 2022. In an Explanation of Benefits dated July 12, 2022, the respondent denied the assessment on the grounds that it was not reasonable and necessary. The applicant proceeded to obtain the assessment from Dr. Gofeld.

[46] As I have found that the applicant suffers from chronic pain, Dr. Gofeld's assessment was reasonable and necessary to make a diagnosis and recommendations for treatment.

THE APPLICANT IS NOT ENTITLED TO THE COST OF THE PSYCHOLOGICAL ASSESSMENT

[47] The applicant requested $2,144.93 for a psychological assessment in a treatment plan by Dr. Hewchuk dated January 14, 2022. In an Explanation of Benefits dated February 2, 2022, the respondent denied the assessment on the grounds that it was not reasonable and necessary. The applicant proceeded to obtain the assessment from Dr. Hewchuk.

[48] The applicant argues that she need only prove that it was reasonable and necessary to explore the possibility that she sustained a psychological impairment, and that she need not prove she actually did sustain an impairment: *Nifco v Economical Insurance Company*, 2023 CanLII 42544 (ON LAT) at para 26. She argues that her family doctor's clinical notes and a psychological screening report show that she experienced mental health issues over the months following the accident. She relies on Dr. Hewchuk's report dated May 14, 2022, in which he identified "sub-threshold" post-traumatic symptom disorder and somatic symptom disorder with predominant pain as diagnostic possibilities. Dr. Gofeld noted several mental health issues in his report but conceded that diagnosing a psychological condition is outside his area of expertise.

[49] The respondent argues that the evidence does not show the applicant had a potential psychological impairment requiring investigation. It argues that her family doctors' clinical notes and records show by and large that she had no accident-related concerns. It relies on Dr. McCutcheon's and Dr. Lau's opinions that she did not suffer from a psychological disorder.

[50] I find that the evidence does not show the applicant had a potential psychological impairment that would have made an assessment reasonable and necessary:

1. The applicant's family doctor noted that she experienced psychological symptoms in the immediate aftermath of the accident, but none are documented in his or his successor's clinical notes and records after March 25, 2019. There is no evidence that the applicant suffered from mental health issues after April 1, 2019—the date of the psychological screening report—until Dr. Hewchuk completed the treatment plan almost three years later.

2. The applicant testified that she did not remember whether she had any mental health issues after the accident. She emphasized that pain was her main concern and did not identify any continuing psychological symptoms. When taken to a clinical note of February 13, 2019 stating that she reported being scared to drive, she testified that she was "really scared" at the time but is not any more.

3. Dr. Hewchuk's description of the applicant is not consistent with her testimony or the other evidence. I provide three examples:

    i. Dr. Hewchuk stated that the applicant reported suffering from severe driving anxiety and being unable to carry out all activities of normal life. She specifically denied that these were issues in her testimony.

ii. Dr. Hewchuk stated that the applicant described herself as impatient, easily irritated, relatively quick-tempered at times, and that she may be easily provoked by others. In her testimony, she did not mention any of these traits and showed no sign of them. Her demeanour was remarkably quiet and soft-spoken.

iii. Dr. Hewchuk stated that the applicant reported experiencing periodic and "perhaps transient" thoughts of self harm. The applicant did not mention experiencing such thoughts in her testimony, nor are they corroborated by her family doctors' clinical notes and records or the other assessors' reports.

INTEREST

[51] The applicant is entitled to interest pursuant to s. 51 of the *Schedule*.

THE APPLICANT IS NOT ENTITLED TO AN AWARD

[52] Section 10 of Regulation 664 states 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 if the respondent unreasonably withheld or delayed payments. Unreasonable behaviour can be seen as excessive, imprudent, stubborn, inflexible, unyielding, or immoderate: *Malitskiy v Unica Insurance Inc.*, 2021 ONSC 4603 (Div Ct) at para 46.

[53] The applicant submits that the respondent unreasonably relied on Dr. Gallimore's and Dr. Loritz's reports for three reasons:

1. The respondent did not provide the applicant's Employer's Confirmation Form (OCF-2) to Dr. Gallimore. The OCF-2 stated that standing for eight hours was an essential task of the applicant's job. Not knowing this, Dr. Gallimore mistakenly concluded that the applicant did not meet the test for a pre-104 week IRB;

2. When the respondent received the family doctors' clinical notes and records, it did not send them to Dr. Gallimore and request an addendum to his report. Had he seen them, he would have revised his conclusion that there was no evidence of any concurrent or pre-existing medical conditions; and

3. Because Dr. Loritz is not a chronic pain specialist, it was inappropriate to commission a report from him on whether the applicant sustained a

predominantly minor injury and whether a chronic pain assessment was reasonable and necessary, and unreasonable to prefer his opinion over Dr. Gofeld's. Furthermore, the respondent did not provide Dr. Gofeld's report to Dr. Loritz and request an addendum to his report.

[54] The respondent argues:

1. The OCF-2 does not state that standing continuously was an essential task of the applicant's job;

2. Dr. Gallimore based his opinion on the applicant's description of her employment tasks;

3. Given that there are few mentions of ongoing pain in the family doctors' clinical notes and records, providing them to Dr. Gallimore would not likely have changed his opinion;

4. Even though Dr. Loritz is not a chronic pain specialist, he was qualified to conduct the assessment, and he provided a cohesive explanation of the applicant's pain complaints that was reasonable to rely on; and

5. Given that the applicant provided Dr. Gofeld's report in January of 2023, there was limited time to commission an addendum from Dr. Loritz.

[55] I find that the applicant is not entitled to an award for the following reasons:

1. Dr. Gallimore was asked to describe the essential tasks of the applicant's employment. He obtained this information from the applicant, who was the best source. While the OCF-2 might have been helpful, it was not indispensable, and I see no reason to infer that omitting to provide it was a deliberate attempt to keep Dr. Gallimore in the dark. In any event, Dr. Gallimore understood that the applicant mostly stood at work because he noted that she "report[ed] occasionally sitting."

2. Omitting to provide the family doctors' clinical notes and records to Dr. Gallimore was not unreasonable conduct meriting an award because they did not call Dr. Gallimore's findings into question. They show that the applicant has complained of pain from time to time since the accident, which is consistent with Dr. Gallimore's finding that the applicant suffered from neck and back pain due to the accident. As they do not contain any detailed information about the impact of the applicant's pain on her ability to work after November 18, 2019, it is unlikely that they would have caused Dr. Gallimore to change his opinion relating to an IRB. Although

they would have shown Dr. Gallimore that she suffered from degenerative disc disease and osteoarthritis, knowing that there were causes of her pain other than the accident would not have changed his opinion on whether she could perform the essential tasks of her job. Dr. Gallimore was not asked to give an opinion on whether the applicant had pre-existing medical conditions within the meaning of s. 18(2) of the *Schedule*.

3. While I find Dr. Loritz's opinion less persuasive than Dr. Gofeld's, the respondent did not act inappropriately in retaining him. As a medical doctor, he was qualified to perform his assessment. There is no requirement that a chronic pain specialist must perform such an assessment. There are no obvious inaccuracies or flaws in Dr. Loritz's findings or reasoning that made it unreasonable for the respondent to rely on his opinion.

4. Declining to obtain an addendum from Dr. Loritz is not on its own unreasonable behaviour meriting an award, particularly given that there was limited time before the production deadline.

ORDER

[56] The applicant is entitled to an IRB of $400.00 per week from November 18, 2019 to February 6, 2023 in accordance with s. 9(1)(b) of the *Schedule*.

[57] The applicant sustained a non-minor injury and is therefore entitled to $65,000 in medical and rehabilitation benefits.

[58] The applicant is entitled to the cost of Dr. Gofeld's chronic pain assessment.

[59] The applicant is not entitled to the cost of Dr. Hewchuk's psychological assessment.

[60] The applicant is entitled to interest on IRB payments and the cost of the chronic pain assessment.

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

Released: June 27, 2023

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Christopher Evans
Adjudicator