LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: A.W.A. vs. Certas Home and Auto Insurance, 2020 ONLAT 18-007207/AABS

Released Date: 05/27/2020
File Number: 18-007207/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:

A.W.A.

Applicant

and

Certas Home and Auto Insurance

Respondent

DECISION [AND ORDER]

ADJUDICATOR: **Paul Gosio**

APPEARANCES:

For the Applicant:	Paul Deluca, Counsel
For the Respondent:	Certas Home and Auto Insurance Jonathan Schrieder, Counsel
Interpreter	Mr. Farsi, Tamil

HEARD: In-Person: **May 21, 22, 23, June 17 and 18, 2019**

OVERVIEW

[1] The applicant seeks entitlement to an income replacement benefit, a treatment plan for physiotherapy services, the cost of catastrophic impairment assessments and an award claim.

[2] The applicant was involved in a motor vehicle accident on December 1, 2015 while on his way to work. He applied for and received an income replacement benefit ("IRB") from December 8, 2015 to December 6, 2016 pursuant to the *Statutory Accident Benefit Schedule – Effective September 1, 2010*[1] ("*Schedule*"). The IRB was then stopped based on the strength of various s. 44 insurer's examinations which all concluded that the applicant did not suffer a substantial inability to perform the essential tasks of his pre-accident employment.

[3] The respondent also relied on the strength of its s. 44 general practitioners' examination when it denied the applicant's request for further physiotherapy services. The s. 44 examination concluded that the applicant had reached maximum medical recovery and, as a result, further physiotherapy services was not reasonable and necessary. Furthermore, because the respondent took the position that the applicant had achieved maximum medical recovery, it determined that there was no need for catastrophic impairment assessments.

[4] The applicant disagreed with the respondent's decisions and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for dispute resolution. The applicant is claiming an award as part of his application as he takes the position that the respondent unreasonably withheld payment of the benefits in dispute. The parties could not resolve the issues in dispute, so the matter proceeded to a hearing.

ISSUES IN DISPUTE

[5] The following issues are in dispute:

I. Is the applicant entitled to receive an IRB in the amount of $270.75 per week for the time period from December 7, 2016 to date and ongoing?

II. Is the applicant entitled to receive a medical benefit in the amount of $1,200.00 for physiotherapy services recommended in a treatment plan submitted, July 6, 2017, and denied by the respondent on September 8, 2017?

III. Is the applicant entitled to receive the cost of examination in the amount of $24,400.00 for catastrophic impairment assessments recommended in a

[1] O. Reg. 34/10.

treatment plan submitted May 18, 2018, and denied by the respondent on May 18, 2018?

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

V. Is the applicant entitled to an award under RRO 664 because the respondent unreasonably withheld or denied payment of benefits?

RESULT

[6] Based on the evidence before me I find that the applicant is entitled to an IRB from December 7, 2016 to December 1, 2017 (with interest pursuant to the limits set out in the *Schedule*) but is not entitled to an IRB after that date. I also find that the applicant is not entitled to the treatment plans in dispute nor an award.

INCOME REPLACEMENT BENEFIT

[7] Entitlement to an IRB is set out in sections 5 and 6 of the *Schedule*. Section 5(1)(1)(i) provides that the benefit is payable if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. Section 6(1) provides that the benefit is payable for the period in which the insured person suffers a substantial inability to perform the essential tasks of his/her employment or self-employment. Section 6(2) provides that the benefit is only payable after 104 weeks of disability if, as a result of the accident, the person suffers a complete inability to engage in any employment or self-employment for which he/she is reasonably suited by education, training or experience.

[8] The applicant submits that he is entitled to an IRB from December 7, 2016 to date due to the physical impairments he sustained as a result of the accident. The applicant bears the onus of establishing on a balance of probabilities, that he is entitled to the IRB as claimed.

Entitlement During the First 104 weeks

[9] The applicant testified that he was employed as a full-time machine operator for [the computer recycling company], on the day of the accident. He explained that he was responsible for cleaning used computers with an air compressor and then packing them onto pallets. He testified that his job was physically demanding and required prolonged standing, repetitive bending forward, crouching, sustaining a stooped position, lifting and carrying. He reported lifting and carrying approximately 900 to 1,600 computers with weight ranging from 20lbs -50 lbs.

[10] The applicant testified that he was involved in a motor vehicle accident while on his way to work. He reports being jolted and shaken up and believes he lost consciousness for a short period of time. Shortly thereafter, he developed a headache with dizziness and felt pain in his neck and back. He was taken to the emergency room at [the Hospital] where he was checked and discharged that same day.

[11] The applicant's pain continued in the following days. He began experiencing pain in his neck, back, shoulders and knees and his headaches continued. He began attending [the Medical Centre] on December 2, 2015 for physiotherapy, message therapy, chiropractic treatment and acupuncture and continued to do so at a rate of approximately once or twice a week.

[12] Dr. Paton, chiropractor, completed a Disability Certificate ("OCF-3") dated December 2, 2015, which noted that the applicant's accident-related injuries and sequelae to include sprain and strain of the cervical spin, whiplash associated disorder (WAD2) with complaint of neck pain. Dr. Paton also indicated that the applicant was substantially unable to perform the essential tasks of his employment as a result of his accident-related injuries and that the applicant could not return to work on modified duties. Dr. Paton noted that the limitations were anticipated to persist for 9 to 12 weeks.

[13] The applicant was assessed by Dr. Majl, neurologist, who completed a neurological assessment reported dated April 30, 2016. Dr. Majl opined that the applicant sustained a mild closed head injury as a result of the accident.

[14] Dr. Ghouse, physiatrist, completed a medical evaluation of the applicant on November 14, 2016. He diagnosed the applicant with: musculoligamentous cervicodorsal strain, chronic myofascial pain; post-traumatic muscle tension and cervicogenic headaches; bilateral cervical radiculopathy or probable thoracic outlet syndrome; right sternoclavloular joint subluxation; lumbar strain; and, a closed head injury (as diagnosed by Dr. Majl). Dr. Ghouse concluded that the applicant would be limited in: using his neck and back in repetitive bending and turning movements; prolonged sitting, forward stooped postures and in prolonged standing; and, moderate to heavy lifting and carrying activities. Dr. Ghouse also concluded that the applicant would have difficulty in using his arms when working above the shoulder level and in frequent reaching and carrying above the shoulder level. Dr. Ghouse opined that the applicant suffers from a substantial inability to perform the essential tasks of his pre-accident employment as it is "a physically demanding job."

[15] The clinical notes and records of Dr. Paton and [the Medical Centre] indicate that the applicant continued to experience pain in his neck, back and shoulders well beyond one-year post accident. Due to the applicant's ongoing pain, his family doctor, Dr. Esadeg, referred him to Dr. Billings' Pain Management Centre.

[16] The applicant saw Dr. Billings for a consultation appointment on November 29, 2017. Dr. Billings diagnosed the applicant with: chronic pain syndrome; whiplash type of injury grade 2; lumbar sprain; cervical sprain; lumbar disc disease; bilateral sciatica; myofascial pain in both shoulders, tendonitis in both shoulders, multilevel cervical disc disease; atypical facial pain and TMJ disorder on both sides. Dr. Billings continues to treat the applicant which appears to provide the applicant with meaningful temporary pain relief.

[17] The applicant submits that his ongoing chronic pain prevents him from being able to: use his neck and back in repetitive bending and turning movements, use his arms when working above the shoulder, stand for prolonged periods of time, engage in repetitive bending forward, crouching, or sustaining a stooped position, lifting and carrying. As a result, the applicant submits that his physical limitations cause him to suffer a substantial inability to perform the essential tasks of his pre-accident employment.

[18] The respondent submits that the applicant is not entitled to an IRB during the first 104 weeks after the accident for two main reasons. First, the respondent raises an eligibility issue as it suggests that the applicant may not have been employed at the time of the accident. I disagree with this suggestion. The applicant's Record of Employment indicates that his last day of paid employment was November 30, 2015 which was the day before the subject accident. The police occurrence report also indicates that the applicant had indicated to the responding officer that he was on his way to work at the time of the accident. The MVA Report also indicates that the accident occurred at approximately 7:50 a.m. and was in close proximity to his place of employment which further supports the applicant's position that he was on his way to work at the time of the accident. As such, I find that the applicant was employed at the time of the accident and dismiss the eligibility issue raised by the respondent.

[19] Second, the respondent submits that even if the Tribunal determines that the applicant was employed at the time of the accident, he failed to establish that his accident related injuries caused him to suffer a substantial inability to perform the essential tasks of his pre-accident employment. The respondent takes this position based on the strength of its s.44 insurer examinations and because it takes the position that the applicant is a very unreliable witness.

[20] Dr. Ballard conducted a insurers physiatry assessment on January 9, 2016 in order to address the applicant's entitlement to IRBs. Dr. Ballard noted that during casual observation, the applicant exhibited greater ranges of motion in his shoulders than demonstrated upon direct examination. He diagnosed the applicant with whiplash associated disorder grade 2 with associated headaches and thoracolumbar spine sprain/strain. Dr. Ballard noted that the applicant demonstrated impairments in the cervical spine and shoulder range of movement

due to self limitation and pain. Dr. Ballard concluded that it was difficult to determine if the applicant was experiencing any objective impairments due to his self limitations and due to the inconsistencies between his reporting and the documentation on file. Specifically, the applicant reported to Dr. Ballard that he lost consciousness following the accident and that his first recollection was that of him regaining consciousness in the hospital. Dr. Ballard notes that this is inconsistent with the Ambulance Call Report which indicates that the applicant was able to communicate with paramedics when he reported headaches and neck pain. The Ambulance Call Report also indicated that the applicant was alert and oriented. As a result, Dr. Ballard opined that the applicant did not suffer a substantial inability to perform the essential tasks of his pre-accident employment.

[21] Dr. Perez conducted a insurers neurology assessment on June 15, 2016 in order to address the applicant's entitlement to IRBs. Dr. Perez diagnosed the applicant with concussion, chronic cervicogenic headache attributed to whiplash injury and non-radicular neck pain – likely cervical sprain and strain. He noted that from a neurological standpoint, the diagnoses are expected to have a good prognosis as the headaches and neck pain are graded 3 out of 10 in severity, there are no headache red flags and no evidence of radiculopathy. He has no symptoms of post concussion syndrome aside from the chronic cervicogenic headaches.

[22] Dr. Perez further noted that the applicant was stretching his neck during the assessment demonstrating a good active range of motion. Dr. Perez also noted that the applicant did not endorse any significant impairment in function at home and in self care. Based on the above, Dr. Perez opined that there is no evidence of a significant neurological injury that would result in the applicant suffering from a substantial inability to perform the essential tasks of his pre-accident employment.

[23] Mr. Grimaldi completed an insurer's Functional Abilities Evaluation on August 25, 2016. Mr. Grimaldi noted that the applicant's ranges of motion were observed to be within functional limits, however, he concluded that the test results were invalid due to the unreliable effort given during the assessment. Mr. Grimaldi opined that the applicant might be capable of greater abilities and that he demonstrated the ability to perform at the sedentary level of work.

[24] Mr. Grimaldi also completed an insurer's Job Site Evaluation and concluded that the applicant's employment was classified as a medium level of work which involved handling, lifting, and carrying loads between 21lbs and 50lbs on an occasional basis and between 11lbs and 20lbs on a frequent basis.

[25] The respondent further points out that the applicant failed to provide his assessors with a complete and accurate account of his circumstances. Some of the issues raised by the respondent are as follows: the applicant told Dr. Pilowsky that his kids and wife were very happy prior to the accident despite separating from his wife in 2015 pre-accident; the applicant told various assessors that the accident

caused him to lose consciousness despite the fact that the Ambulance Call Report indicated that the applicant was alert and oriented; and, the applicant denied pre-accident health issues that were noted in his medical records.

[26] The respondent submits that these discrepancies along with the applicant's unreliable effort and self limitation exhibited by the applicant during the s.44 examinations make him an unreliable witness.

[27] I note the inconsistencies raised by the respondent with respect to some of the applicant's evidence, however, I find him to be credible and his testimony compelling when it comes to his chronic pain and the resulting impairments that flow from it. I accept that the applicant is unable to use his neck and back in repetitive bending and turning movements, use his arms when working above the shoulder, stand for prolonged periods of time, engage in repetitive bending forward, crouching, or sustaining a stooped position and to lift and carry the weight demanded by his pre-accident employment. As such, I find that he is substantially unable to perform the essential tasks of his pre-accident physically demanding job.

Entitlement Post 104 Weeks

[28] In order for the applicant to be eligible for an IRB after the first 104 weeks from the date of the accident, he must show, on a balance of probabilities, that he is completely unable to engage in any employment for which he is reasonably suited by education, training or experience. This is commonly referred to as the more stringent "complete inability test" or the "post 104 test".

[29] The applicant submits that he met his onus. He came to Canada in 2002 and has since worked on a ginseng farm, at a cleaning company, pizza shop and as a machine operator. He submits that his physical impairments prevent him from engaging in any employment which is physical in nature and some employment which is sedentary. He also submits that because his English is quite limited, he is unable to engage in any customer service employment and some employment which is sedentary.

[30] I am not persuaded by the applicant's submission and find that he has not met his onus in establishing his entitlement to post 104 IRB's. The applicant did not submit any reports that concluded that he met the "post 104 test" and I have not been directed to any of the submitted clinical notes and records which address this issue. The OCF-3 completed by Dr. Paton is also silent with respect to whether the applicant meets the "post 104 test" and noted that the applicant's limitations were anticipated to persist for 9 to 12 weeks.

[31] Based on the above, the applicant has not satisfied me, on a balance of probabilities, that he suffers from a complete inability to engage in any employment for which he is reasonably suited by education, training or experience.

I acknowledge the applicant's testimony with respect to the pain he experiences after continuous sitting or standing for prolonged periods of time, however, the applicant's self-reports of pain are not sufficient enough to persuade me on a balance of probabilities that he suffers from a complete inability to engage in any employment for which he is reasonably suited by education, training or experience.

DISPUTED TREATMENT PLANS

[32] The applicant's entitlement to the treatment plans in dispute turns on whether the particular treatment plan is reasonable and necessary in accordance with sections 14 and 15 of the *Schedule*. The applicant bears the onus of establishing on a balance of probabilities that the treatment plan in dispute is reasonable and necessary.

Treatment and Assessment Plan in the Amount of $1,200.00 for Physiotherapy Services

[33] This treatment plan was completed by Dr. Paton, chiropractor, and proposes funding for 12 sessions of physiotherapy treatment in the amount of $1,200.00. The goal of the treatment plan was to accelerate tissue repair and cell growth, to assist with mobility restoration and to assist the applicant with his return to his activities of normal living.

[34] The applicant submits that this treatment plan is reasonable and necessary in light of his ongoing pain and functional limitations. I disagree with the applicant's submission in this regard. At the hearing, the applicant testified with respect to the effectiveness of the physiotherapy treatment provided for by Dr. Paton. The applicant testified that the treatment "made the pain worse" and that "I could not handle the pain." Given this revelation, I find that the treatment plan is not reasonable nor necessary.

Treatment and Assessment Plan in the Amount of $24,000.00 for Catastrophic Impairment Assessments

[35] This treatment plan, dated March 19, 2018, was completed by Dr. Milad, physician, and proposes funding for several catastrophic impairment assessments in the amount of $24,000.00 in order to determine if the applicant sustained a catastrophic impairment due to a mental or behavioural disorder (Criterion 8). Dr. Milad diagnosed the applicant with a concussion, sprain and strain of the cervical spine, whiplash associated disorder [WAD 2] with complaint of neck pain with musculoskeletal signs.

[36] The applicant submits that the evidence supports his position that he may be catastrophically impaired and that it is reasonable and necessary to investigate this through the proposed catastrophic impairment assessments. The respondent submits that it is unreasonable to suggest that the applicant may be catastrophically impaired and therefore it is not necessary to investigate this

through catastrophic impairment assessments. The applicant bears the onus, on a balance of probabilities, to show entitlement to the assessments. I also note that, by their nature, assessments are speculative.

[37] As Vice Chair Flude stated at paragraph 37 of *R.L. v. The Guarantee Company of North America*:

> "By their nature, assessments are speculative. They are conducted to determine if an applicant has a specific condition or meets a specific threshold. There is a likelihood that the assessment will prove negative. Having said that, I accept the respondent position that there must be some suggestion that the specified condition exists, and that further investigation is reasonable and necessary."

[38] On the facts before me, I can see no reasonable basis to conduct assessments to determine if the applicant is catastrophically impaired under Criterion 8. Although the evidence establishes that the applicant continues to suffer from chronic pain, there is limited evidence before me with respect to the extent of the applicant's psychological impairments.

[39] Dr. Pilowsky conducted a psychological assessment on June 28, 2016. Dr. Pilowsky diagnosed the applicant with Major Depressive Disorder, Single Episode, Severe; Post-Traumatic Stress Disorder; and, Symptoms of Somatic Symptom Disorder with Predominant Pain. I have placed very little weight on Dr. Pilowsky's opinion given that the assessment was conducted in English without the assistance of an interpreter. I find this to be problematic given the applicant's limited ability to converse in the English language and his acknowledgement that it would have been beneficial to have an interpreter present during the assessment.

[40] In addition to this, Dr. Patel, psychiatrist, completed a s.44 insurer's examination on September 8, 2016 with the aid of an interpreter. The applicant was screened for but did not meet the criteria for hypomania, mania, psychosis, post-traumatic stress disorder, obsessive-compulsive disorder, generalized anxiety disorder (excessive uncontrollable generalized worry), social anxiety disorder or panic disorder (recurrent unexpected panic attacks). Dr. Patel then recommended that the applicant undergo a neuropsychological evaluation in order to help understand the etiology and severity of the applicant's reported problems.

[41] Dr. Ladowsky-Brooks completed a s. 44 neuropsychological assessment November 17, 2016. She opined that from a cognitive perspective only, there was no convincing evidence that the applicant could not carry out the duties of his pre-accident employment.

[42] Very limited information relating to the applicant's psychological impairments, if any, followed these assessments. The treatment plan proposing funding for the catastrophic impairment assessments was submitted on May 18, 2018 and I see no objective evidence to suggest the applicant may have suffered from a

catastrophic impairment as per Criterion 8 at that time. Given this, I find that this treatment plan is not reasonable and necessary.

AWARD

[43] The applicant submits that he is entitled to award under Ontario Regulation 664 because the respondents unreasonably terminated the applicant's IRB on the basis that he was not working at the time of the accident.

[44] Section 10 of Reg. 664 states that an amount of up to 50 per cent with interest on all amounts owing may be awarded if an insurer has unreasonably withheld or delayed payments. The test for a special award requires an examination as to whether the insurer gave reasonable consideration to all the information available to it in assessing a claim. An insurer will not face a special award just because an arbitrator finds that the insurer got it wrong.

[45] In this case, I find that the insurer gave reasonable consideration to all the information available to it when it considered the applicant's continuing entitlement to the IRB. The Explanation of Benefits dated December 6, 2016 clearly states that IRB was being terminated based on the strength of the s. 44 Physiatry and Neurology reports dated June 29, 2016, and the s. 44 Neuropsychology report dated November 30, 2016. As a result, I find that an award is not warranted in the circumstances of this case.

CONCLUSION

[46] For the reasons outlined above, I find that:

I. The applicant is entitled to receive an IRB in the amount of $270.75 per week for the time period from December 7, 2016 to December 1, 2017(with interest pursuant to the limits set out in the *Schedule*);

II. The applicant is not entitled to receive an IRB in the amount of $270.75 per week for the time period from December 2, 2016 to date;

III. The applicant is not entitled to receive a medical benefit in the amount of $1,200.00 for physiotherapy services recommended in a treatment plan submitted, July 6, 2017;

IV. The applicant is not entitled to receive an examination in the amount of $24,400.00 for catastrophic impairment assessments recommended in a treatment plan submitted May 18, 2018; and

V. The applicant is not entitled to an award under Reg. 664.

Released: May 27, 2020

Paul Gosio
Adjudicator