Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Ontario

Citation: Binet v. Liberty Mutual Insurance Company, 2021 ONLAT 20-001886/AABS

Released Date: 07/09/2021
File Number: 20-001886/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:

Tim Binet

Applicant

and

Liberty Mutual Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam, Vice Chair**

APPEARANCES:

For the Applicant:	Nick De Koning Counsel
For the Respondent:	Jonathan Schwartzman Counsel

HEARD By Video conference May 11 and 13, June 11 and 21, 2021

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] Tim Binet ("applicant") was involved in an automobile accident on July 11, 2017 ("accident"), and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). [1]

[2] Liberty Mutual Insurance Company ("respondent") denied an income replacement benefit ("IRB") to the applicant effective April 11, 2019 when it determined him ineligible and denied other benefits.

[3] The applicant disagreed and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal).

ISSUES

[4] The issues to be decided are:

i. Is the applicant entitled to an IRB in the amount of $400.00 per week from April 11, 2019 to date and ongoing?

ii. Is the applicant entitled to physiotherapy recommended by Grand River Sports Medicine in the amount of $1,865.50 submitted on January 25, 2019 and denied on April 9, 2019 ("disputed treatment plan")?

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

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

RESULT

[5] I find that the applicant is not entitled to IRB in the amount of $400.00 per week, or in any other amount, for the period in dispute. I find that the applicant is not entitled to the disputed treatment plan. No award is made. No interest is payable.

LAW

[6] An employed person's entitlement to an IRB falls under s. 5(1)(1)(i) of the *Schedule.* An IRB is payable if the insured was working at the time of the

[1] O.Reg. 34/10

accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. If the insured was working at the time of the accident, this inquiry is divided into two steps: 1) what are the essential tasks of employment; and, 2) is the insured substantially unable to perform the essential tasks of that employment?

[7] In order to prove entitlement to IRBs post-104 weeks, s. 6(2) of the *Schedule* provides that the applicant must suffer a complete inability to engage in any employment for which the applicant is reasonably suited by education, training or experience.

[8] The onus is on the applicant to prove entitlement to IRB and quantum on a balance of probabilities.

[9] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident.

[10] The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

ANALYSIS

Is the Applicant Entitled to IRB in the amount of $400.00 per week from April 11, 2019 to date and ongoing?

[11] The applicant was employed as a package driver by a parcel delivery company for some 20 years prior to the accident. After the accident on July 11, 2017 and prior to October 11, 2017, the applicant had gradually returned to work, was lifting up to some 60 pounds and almost at full duties. However, the applicant's position is that he became unable to work October 12, 2017 because of physical and psychological injuries he sustained October 12, 2017 which were caused by the accident.

[12] The applicant also submits that he had pre-existing conditions which were exacerbated by the accident and prevent him from performing the essential duties of his pre-accident employment. He stated that his symptoms worsened as his workload increased until October 12, 2017 when he developed severe left neck and rhomboid pain radiating to left arm with weakness and numbness in his left arm and hand. In addition to his own testimony, the applicant relies on various medical and other records including those of Dr. Bauman, his family physician, and the records and testimony of Dr. Surla, applicant's chiropractor,

and the November 4, 2019 “psycho-vocational-legal assessment” report of Dr. Gouws, applicant’s psychologist, to support his position that he meets the test for entitlement to IRB for both the pre- and post-104 week periods and that he is entitled to the disputed treatment plan, an award and interest.

[13] The respondent submits the applicant’s impairments were not caused by the accident but by a disc herniation that he suffered on October 12, 2017, that the applicant has not demonstrated the degree of impairment necessary to meet the IRB eligibility tests for either the pre- or the post-104 week period and that the disputed treatment plan is not reasonable and necessary. The respondent relies on various records including the report and testimony of Dr. Jaroszynski, orthopaedic surgeon.

What were the essential tasks of the applicant’s employment?

[14] The essential tasks of the applicant’s employment are driving a company vehicle and loading, unloading and delivering packages including lifting and carrying packages weighing approximately 60 pounds and sometimes up to 150 pounds.

Does the applicant suffer a substantial inability to complete the essential employment tasks?

[15] I find that the applicant is not eligible for post-104 week IRB based on a lack of medical evidence establishing he has substantial inability to complete the essential tasks of his pre-accident employment because of injuries caused by the accident.

[16] The applicant testified that due to ongoing pain in his back, neck shoulder, nerve damage and herniated disc, he is unable to lift or carry anything more than five to ten pounds with his left hand due to tingling, weakness and numbness and cannot grip with his left hand. Because of numbness in his left hand, his driving is limited. The applicant testified that he cannot sit or lie in any position without pain and that he has psychological injuries. The applicant attributes all of these injuries and pain to the accident.

[17] I find, however, that the medical evidence does not support the applicant’s position that he has a substantial inability to complete the essential tasks of his pre-accident employment because of injuries caused by the accident. The applicant’s medical records post-accident and before the disc herniation on October 12, 2017, taken in totality, establish that the applicant’s physical injuries from the accident were soft tissue injuries only and were substantially healed by the time the disc herniation occurred.

[18] The applicant did not go to the hospital at the time of the accident and did not see his family physician Dr. Bauman until the next day. At that time, Dr. Bauman noted there is no pain radiating down the applicant's arms, no numbness or tenderness, and notes a contusion that does not interfere with the applicant's walking. Dr. Bauman diagnoses soft tissue injuries only. The July 12, 2017 x-ray of the cervical spine showed only degenerative changes and no disc herniation caused by the accident.

[19] There are no records of the applicant making any complaints of psychological injuries to Dr. Bauman until after the disc herniation.

[20] Dr. Bauman's diagnosis of soft tissue injuries only arising from the accident is consistent with the August 4, 2017 report of the applicant's physiotherapist Kristy Commerford to Dr. Bauman that she assessed the applicant on July 14, 2017 and noted his injuries from the accident as "left shoulder strain and contusion, cervical and upper thoracic sprain, superior tib-fib joint strain and contusion". Ms. Commerford listed the applicant's problems as decreased range of motion, left shoulder and knee, upper thoracic and cervical spine, decreased joint mobility left superior tibio-squatting, calf raises, single stance left, left arm-hand behind back, decreased participation in social and recreational activities – walking and symptoms post-motor vehicle accident – headache, neck and upper back pain, shoulder and knee contusion, painful weight-bearing left lower extremity.

[21] Starting a few days after the accident and until October 11, 2017, the applicant testified that he was at work. The applicant's employer's record indicate he was working full hours on modified duties. The applicant said he could lift some 60 pounds, was almost at full duties by October 11, 2017 and that the day before the disc herniation he drove the company vehicle and delivered a box of bibles to a customer that weighed approximately 60 pounds. The applicant admitted that he had been cleared to lift 60 pounds by October 11, 2017.

[22] The applicant's testimony about his ability to perform the essential tasks of his employment the day before his disc herniation is consistent with Dr. Bauman's June 27, 2017 and July 18, 2017 records indicating that the applicant's injuries from the accident were improving.

[23] In the early morning hours of October 12, 2017, the applicant testified that he rolled over in bed and felt something "popped" in his neck. He felt extreme pain. The next morning, he went to see Dr. Bauman who sent him to the hospital in an ambulance. Dr. Furqan, the emergency department physician at the hospital notes the applicant "has had shoulder and neck pain worked at physio, chiro.

Today woke up with sudden acute pain left shoulder with radiation in left arm, worse with arm movement, complaining of neck pain as well." It was suspected that the event was cardiac related because of pain radiating down his arm but this was ruled out at the hospital. The applicant was diagnosed with a left C7-T1 disc herniation with secondary C8 radiculopathy ("disc herniation"). The applicant had neck pain, shoulder pain, burning sensation and numbness in left hand post-disc herniation. The November 15, 2017 MRI showed C7-T1 left lateral disc protrusion and moderate left neural foraminal stenosis with impingement on the exiting nerve root.

[24] Dr. Bauman appears to attribute the disc herniation to the applicant's workload. Dr. Bauman's November 21, 2017 statement to The Manufacturer's Life Insurance Company diagnoses left C7-T1 disc herniation with C8 radiculopathy and notes "Patient originally improved after accident and returned to modified duty. Symptoms worsened as workload increased. On Oct 12/17 he developed severe left neck and rhomboid pain radiating to left arm with weakness and numbness in his left arm/hand…..patient is currently not able to work due to severe neck and arm pain with left arm weakness, numbness and tingling".

[25] Dr. Bauman appears to also attribute the disc herniation to the accident. In his November 22, 2017 OCF-3, disability certificate, Dr. Bauman lists the injuries directly resulting from the accident as flexion extension injury of C-spine, C7-T1, C6-C7 disc herniation and left C7, C8 radiculopathy. Dr. Bauman opines that the applicant is substantially unable to perform the essential tasks of his employment at the time of the accident and within 104 weeks of the accident and that the applicant cannot return to work on modified hours and/or duties. However, Dr. Bauman gives no explanation in the disability certificate for either of these statements. Dr. Bauman did not testify at the hearing.

[26] I give Dr. Bauman's opinion little weight. It is not supported by the July 12, 2017 imaging, Ms. Commerford's description of the applicant's injuries resulting from the accident or the opinion of Dr. Jaroszynski, respondent's orthopaedic surgeon.

[27] Dr. Surla's opinion is also insufficiently persuasive. Dr. Surla conceded in cross-examination that he would have to defer to the opinion of a physician with respect to the cause of the applicant's physical injuries.

[28] Regarding the applicant's physical injuries, I prefer Dr. Jaroszynski's opinions over that of Dr. Bauman, family physician, and Dr. Surla, chiropractor, because of the thoroughness of his physical examination, his careful review of all relevant medical records, his specialized orthopaedic education, training and experience. Dr. Jaroszynski, after reviewing the applicant's relevant medical records and

examining him, opined in his April 1, 2019 report that at this point, there is no musculoskeletal impairment attributable to the accident and that the applicant does not suffer an inability to engage in his pre-loss occupational activities as a result of any accident-related issues. In his second report, Dr. Jaroszynski concludes that the applicant's soft tissue injuries from the accident would have healed within a few months post-accident and notes the concurrent unrelated disc herniation cannot be causally attributed to the accident. Dr. Jaroszynski testified at the hearing that the two disability certificates, one by Dr. Bauman and one by Ms. Commerford are incorrect and that the applicant does not have a substantial inability to complete the essential tasks of his employment because of physical injuries resulting from the accident. I accept Dr. Jaroszynski's opinion including his opinion that the applicant's disability certificates are incorrect.

[29] Dr. Moammer, applicant's neurosurgeon, assessed the applicant in June, 2018 and noted both the accident and the applicant's neck pain which started October 11, 2017. Dr. Moammar does not make any connection between the accident and the neck pain three months later. Dr. Moammer refers to a September, 2018 MRI and notes that the C7-T1 disc protrusion is no longer seen in this MRI and there has been improvement as a result of physiotherapy treatment.

[30] Dr. Gouws diagnosed the applicant's psychological injuries arising from the accident as chronic pain disorder, limitation of activity due to disability, recurrent depressive disorder, panic disorder, agoraphobia, specific (isolated) phobias (driving/passenger anxiety), generalized anxiety disorder and chronic adjustment disorder. Dr. Gouws opined that, from a purely psychological perspective, the applicant's ability to perform his regular and usual employment activities is compromised. I find Dr. Gouws' opinion is not persuasive evidence that the applicant has a substantial inability to complete the essential tasks of his employment because of psychological impairments resulting from the accident and I give it no weight for the following reasons.

[31] Firstly, although Dr. Gouws opines that "…the impairments related to the diagnosed psychological conditions have been continuous since the accident…", I find this to be unfounded. Dr. Gouws did not assess the applicant in the three months between the accident and the disc herniation and has no first hand knowledge of the applicant's psychological conditions between the date of the accident and the disc herniation. Further, there are no records of Dr. Bauman or any other physician documenting complaints from the applicant of any psychological injuries arising from the accident in the three month period between the accident and the disc herniation. Still further, the applicant's physiotherapist Ms. Commerford does not mention any psychological complaints

by the applicant in her August 4, 2017 report to Dr. Bauman. Dr. Gouws attempted to explain this lack of medical documentation of psychological complaints in the three months post-accident with the statement "absence of evidence is not evidence of absence". Here, I find as a fact that there is an absence of evidence of any psychological complaints, diagnosis and treatment after the accident and before the disc herniation. As stated before, the burden rests with the applicant to establish that he has the injuries claimed and that those injuries were a result of the accident. Dr. Gouws evidence does not assist the applicant in meeting that burden. Secondly, Dr. Gouws does not have any first hand knowledge of the applicant's psychological condition until November, 2019, more than two years after the disc herniation occurred. Thirdly, Dr. Gouws conceded in his testimony that he cannot speak to the causation of the October 2017 disc herniation and that he would have to defer to a physician on that issue. The physician with the most relevant specialised training, education and experience here is Dr. Jaroszynski. Fourthly, Dr. Gouws, like Dr. Surla, was selective about the applicant's medical records relied on in their opinions. Both of them failed to note the June 27, 2017 and the July 18, 2017 records indicating improvement in the applicant's physical condition post-accident and pre-disc herniation.

[32] Although Dr. Gouws suggests in his report that the applicant is not able to do any employment, including his pre-accident employment, he admitted in his testimony that he has no qualifications as a vocational assessor.

[33] The applicant submits that because Dr. Gouws is the only opinion before me of the applicant's mental condition, I should accept Dr. Gouws' opinion in the absence of any opinion to the contrary. I do not agree. The burden is on the applicant to establish that his mental condition was caused by the accident and I have found Dr. Gouws' opinion insufficient to do so on a balance of probabilities. The applicant has not met his burden to establish that his alleged mental condition arises from the accident.

[34] The applicant submits that the appropriate legal test for causation here is generally the "but for" test relied on by Dr. Gouws' report and that it is not necessary for the applicant to prove that the accident is the sole cause of the impairments. Instead, the effects of the accident can be cumulative and the applicant need only establish that the accident was a necessary cause of the impairments on a balance of probabilities. The applicant cites several cases

including *Sabadash*[2] for the proposition that, in the statutory accident benefits context, the accident does not need to be the sole cause of the impairment, just one of the causes.

[35] This proposition is not in dispute here. Theoretically an applicant's injuries could have more than one cause in some circumstances. However, causation is a factual determination made on a balance of probabilities[3] and I have found as a fact, based on the totality of the medical and other evidence before me, that the applicant's physical and psychological impairments post-disc herniation were not caused by the accident either solely or in conjunction with another cause or causes. The applicant has not met his burden to prove, on a balance of probabilities, that his injuries were caused by the accident.

[36] The prior Tribunal decisions cited by the applicant are not binding on me and, more importantly, they followed *Sabadash* in circumstances factually distinct from those before me. In *Switzer,* the Tribunal found that the accident was a necessary cause that exacerbated the applicant's pre-accident psychological and cognitive conditions based on the basis of the applicant's psychological condition diagnosed pre-accident and treated pre-accident with counselling and pharmacological therapy and post-accident evidence of exacerbation of this pre-accident psychological condition. Here, I have found the evidence of Dr. Gouws insufficient to establish the applicant suffered any psychological condition as a result of the accident for the reasons above. Similarly, in *V.H.W.* the Tribunal found the applicant to have suffered catastrophic impairment on the basis of medical evidence it found persuasive. That is not the case here for the reasons given above.

[37] The applicant also submits I should find persuasive the fact that the applicant qualified for Canada Pension Disability ("CPP") payments. I disagree. Eligibility for CPP is determined under specific Federal legislation. As a result, the decision of the CPP arbitrator is not binding on me nor is it relevant or persuasive.

[38] The applicant also submits that his physical and psychological injuries prevent him from returning to his pre-accident employment and that his education and past work experience qualifies him for only his pre-accident employment and no other type of employment. Here, the applicant submitted no persuasive medical evidence in support of this claim. The vocational opinion of Dr. Gouws is given

[2] *Sabadash v. State Farm et al.,* 2019 ONSC 1121 (Div. Crt.); *V.H.W. v. Security National Insurance Company,* 2019 CanLII 130605 (ON LAT)*; Switzer v. Waterloo Insurance,* 2017 CanLII 152537 (ON LAT).

[3] *Sabadash v. State Farm et al.,* 2019 ONSC 1121 at para 31-34.

no weight because of his admission that he has no qualifications as a vocational assessor. Further, the evidence before me establishes that the applicant had returned to work full time by October 11, 2017 and it was the injuries resulting from the disc herniation, not the accident, that have led the applicant to conclude that he cannot work at his pre-accident employment.

[39] Taken as a whole, the weight of the medical evidence fails to establish that the applicant meets the eligibility test for IRB. Even if there may be some tasks of his employment that the applicant might not be able to return to as a result of the accident, which the applicant has not established, I find that the applicant does not suffer from a substantial inability to perform the essential tasks of his pre-accident employment as a result of the accident. The onus of proof is on the applicant and I find that he has failed to meet it.

Does the applicant suffer a complete inability to engage in any employment?

[40] As the applicant has not satisfied his burden of substantiating entitlement to pre-104 week income replacement benefit, the post-104 week income replacement benefit test of complete inability to engage in any employment cannot be met.

Is the Applicant Entitled to the Disputed Treatment Plan for Physiotherapy?

[41] The applicant submits that this disputed treatment plan for chiropractic treatment made by Kristy Commerford, physiotherapist, and submitted January 25, 2019 is reasonable and necessary. The treatment plan proposes an assessment for $70.00 and 26 sessions at $45.00 per session with goals of pain reduction, increased range of motion, return to activities of normal living and return to pre-accident work activities.

[42] The respondent submits that the applicant's evidence does not establish that this chiropractic treatment is reasonable and necessary. The respondent relies on the opinion of Dr. Jaroszynski who opined that this proposed treatment is not reasonable and necessary.

[43] I find that the applicant is not entitled to this proposed chiropractic treatment because there is insufficient medical evidence before me that this treatment, proposed approximately one and one-half years after the accident is reasonable and necessary as a result of the accident.

[44] I find based on the opinion of Dr. Jaroszynski, the only physician with specialized expertise to opine on the disputed treatment plan, that this proposed treatment is not reasonable and necessary. I accept Dr. Jaroszynski's opinion over that of

Drs. Bauman, Surla and Gouws and Ms. Commerford based on his specialized education, training and experience.

[45] Further, I am not satisfied that the goals of the disputed treatment plan are reasonable and necessary in this particular case. The weight of the medical evidence indicates that the applicant has no accident-related injuries to treat. The applicant has the burden of bringing forward persuasive medical evidence demonstrating that the goals of this treatment plan are reasonable and necessary as a result of injuries sustained in the accident, that the goals are being met to a reasonable degree and that the overall cost is reasonable and he has not satisfied that burden.

Is the Applicant Entitled to an Award?

[46] Section 10 of Regulation 664 provides that a special award may be granted if the respondent has unreasonably withheld or delayed payments. As there are no IRB or other benefits payable, the respondent has not unreasonably withheld or delayed the payment of benefits. As a result, no award is made.

Is the Applicant Entitled to Interest?

[47] As no benefits are payable, no interest is payable.

ORDER

[48] For the above reasons, I find that the applicant is not entitled to IRB in the amount of $400.00 per week, or in any other amount, for the period in dispute. I find that the applicant is not entitled to the disputed treatment plan. No award is made. No interest is payable.

Released: July 9, 2021

Avril A. Farlam, Vice Chair