



**Citation: Tsourkan v. Pembridge Insurance Company, 2023 ONLAT
21-001200/AABS**

Licence Appeal Tribunal File Number: 21-001200/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:

Dimitri Tsourkan

Applicant

and

Pembridge Insurance Company

Respondent

DECISION

VICE-CHAIR: Chloe Lester

APPEARANCES:

For the Applicant: Ilya Kirtsman, Counsel
Natalie Chan, Student at law

For the Respondent: Kamil Podleszanski, Counsel

HEARD: In Writing Via Written Submissions

OVERVIEW

- [1] Dimitri Tsourkan, the applicant, was involved in a collision on August 27, 2019. He alleges he suffered injuries as a result 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 income replacement benefits (IRB) and occupational therapy by the respondent, Aviva Insurance Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for dispute resolution.

ISSUES

- [2] The issues in dispute, as agreed on and amended from the case conference order, are:
- i. Is the applicant entitled to an IRB in the amount of \$385.14 per week from August 27, 2019, to date and ongoing?
 - ii. Is the applicant entitled to an occupational therapy treatment plan in the amount of \$3,936.45 recommended by Functionability Rehabilitation on September 18, 2020?
 - iii. Is the respondent liable to pay an award under s. 10 of 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

- [3] The applicant is not entitled to any of the benefits being claimed. He is not entitled to an award or interest. The application is dismissed.

OVERVIEW OF THE ACCIDENT AND CAUSATION

- [4] The main issue in this hearing is whether the applicant sustained psychological impairments from the accident.
- [5] The applicant argues that his pre-accident mental health condition was poor in 2017 when he was diagnosed with psychosis. However, he claims it resolved. He relies on three consultation reports authored between January and April 2018, by Dr. Cooke, a psychiatrist, that indicated that he no longer had any psychosis or suicidal thoughts. In his affidavit, the applicant describes his life in the year prior to the accident as normal and that he was functioning well. He argues that he

could work, and he tendered in evidence many pictures of himself travelling, engaging socially, and going to the gym.

- [6] In his submissions, the applicant described the car accident and the events that followed as such:

He was driving along a public highway in or near the City of Niagara Falls, Ontario, with his seatbelt on. He recalls hitting a bump. As a result, he lost control of his vehicle and veered off the road with his vehicle going through a fence, then passing through a gate, and then the vehicle went off the edge of a canal into a body of water. The applicant was able to exit his sinking vehicle and swim to the shore. He did not have his phone with him and could not call anyone. He took off his drenched clothing, laid down and fell asleep. The applicant does not remember if he hit his head or lost consciousness. The applicant eventually woke up a day later and proceeded to walk home. His roommates noted confused and bizarre behaviour. An ambulance attended his home, and he was transported to Niagara Hospital. He presented with numerous injuries including cuts and scratches on his body, as well as a swollen left foot. He was transferred from Niagara Hospital to St. Catherine's Hospital, where he was admitted to the psychiatric ward on August 31, 2019, due to depressive and psychotic symptoms. Seven months later, on March 20, 2020, he was discharged with a Community Treatment Order for treatment by psychiatrist, Dr. Muhammad, as well as with referrals to Outpatient Mental Health, Gateway Residential and Community Support Services for case management and to Canadian Mental Health Association (CMHA) for housing support.

- [7] Post-accident, the applicant relies on a report dated June 23, 2021, authored by Dr. Waisman, that opined that he was in a vulnerable state and that the accident amplified his pre-accident psychosis and he developed a new psychiatric disorder, somatic pain disorder.
- [8] The respondent argues that this event was an attempted suicide attempt and relies on the report of Dr. Sharma dated February 5, 2021, which opined that the applicant was likely unstable prior to the accident and that his mental health instability and substance abuse contributed to the accident and bizarre behaviour that followed. He opined that the applicant's current symptoms are unrelated to the accident because they are resulting from his pre-accident psychiatric disorder and possible side effects of his medication to treat it.
- [9] I find that the applicant did not suffer from a mental health condition from the accident because, on the balance of probabilities, he was still experiencing

psychological symptoms the year before the accident and was showing signs of declining mental health just before the accident. There is also no causal link in the treating records that the applicant's psychiatric issues were related to the accident. I also find that the applicant does not suffer from a somatic pain disorder from the accident because there is not enough evidence to support the diagnosis.

- [10] The leading case for causation in accident benefits cases is *Sabadash v. State Farm et al.*, 2019 ONSC 1121. In *Sabadash* the Divisional Court articulated the “but for” test. The accident-related cause need not be the major cause of the impairments, but the applicant must show that he would not have suffered the injuries “but for” the accident. The accident does not need to be “the cause” of the injuries, but at least “a necessary cause.” This decision is relied upon by the applicant. The applicant argues that the law is clear, that but for the subject accident, his post-accident impairments would not exist, therefore causation is established.
- [11] The applicant has not provided enough evidence to support that the accident exacerbated his mental health condition or was a necessary cause of the accident. The applicant is focusing his main argument regarding causation on the fact that he had no indication of psychotic behaviour in the two years prior to the accident but then immediately after the accident started exhibiting that behaviour again. The applicant argues that the accident must have caused the injuries, including exacerbation of his psychiatric impairments, because before the accident he was fine, living a normal life, travelling, working, enjoying time with friends, and exercising. He also relies on the progress notes authored by Dr. Cooke in 2018, a psychiatrist from CAMH, which found that he had no psychosis or suicidal ideation. The applicant argues that it must be the accident that contributed to his psychiatric impairments. To support this conclusion, the applicant relies on the opinion of Dr. Waisman that the applicant's pre-existing psychiatric impairments were exacerbated by the accident.
- [12] I find that the applicant was not functioning well prior to the accident as he still was experiencing psychiatric symptoms in the year leading up to the accident. The records from CAMH indicate that the applicant was still experiencing a fair amount of anxiety and decided to pursue treatment for it. He also exhibited obsessive tendencies. In addition, a few days before the accident, he began a new antidepressant with the results being unknown. Treatment was recommended for him. He was also having difficulties motivating himself to pursue his seasonal employment. Therefore, I find that in 2018 the applicant was still experiencing psychological symptoms affecting his ability to function.

- [13] I also find that the applicant was already showing a decline in his mental health status just prior to the accident such that I cannot conclude the accident exacerbated his condition or that his condition would not have occurred but for the accident. For example, just a few days before the accident, the applicant was prescribed Zoloft on August 22, 2019.
- [14] Similarly, I give less weight to Dr. Waisman's report because I find his analysis of the applicant's pre-accident function is not in line with treatment records and no post-accident treatment records support that the accident affected the applicant's psychiatric condition. Dr. Waisman's opinion heavily relies upon the fact that the applicant was active and independent before the accident, and after, he was not. As found above, the applicant was still having significant difficulties, he was trying new medications, and additional treatment was being recommended. He was also prescribed a new psychiatric medication just days prior to the accident.
- [15] Further, I find that no post-accident treatment records support that the accident caused an exacerbation of the applicant's psychiatric condition or any new conditions. The applicant was under medical supervision for seven months post-accident. After being released from the hospital, the applicant's discharge summary report dated March 20, 2020, indicates that he was admitted into the psychiatric unit due to "depressive and psychotic symptoms in the context of noncompliance with his medications and cannabis use." It also states that before he was admitted to the hospital, the applicant was experiencing a substance-induced psychotic disorder. None of the records point to the accident as being the cause of the psychiatric issues. I give more weight to the respondent's psychiatric report of Dr. Sharma that concluded the applicant was likely unstable before the accident, explains how the pre-accident history impacted his psychiatric state around the time of the accident, and how his current psychiatric diagnosis' is unrelated to the accident. Therefore, on the balance of probabilities, I find the applicant did not sustain an exacerbation of his pre-accident condition and the accident was a necessary cause of the post-accident psychiatric condition.
- [16] Lastly, I also give little weight to Dr. Waisman's diagnosis of somatic symptom disorder because he gave no analysis as to how he arrived at his conclusion. Dr. Waisman's report indicates that the applicant has constant, severe pain in his head, neck, shoulders, low back, left ankle, right foot, and knees. The report then explains the criteria for somatic pain disorder, states that the applicant is suffering from chronic pain, and had no physical issues before the accident. It then concludes the applicant is suffering from somatic symptom disorder. The report contains no analysis regarding how the criteria for the disorder were met

or whether the current pain complaints were a result of the accident. Therefore, on the balance of probabilities, the applicant does not have somatic pain disorder from the accident.

- [17] Accordingly, I find the applicant has not met his burden to demonstrate that his impairments were caused by the accident.

ANALYSIS

The applicant is not entitled to an IRB

- [18] On the balance of probabilities, the applicant has not met his onus to demonstrate that he is entitled to an IRB.
- [19] To receive payment for an IRB under s. 5(1) of the *Schedule*, the applicant must be employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffer a substantial inability to perform the essential tasks of that employment. This is referred to as the pre-104-week test. The applicant must identify the essential tasks of their employment, which tasks they are unable to perform and to what extent they are unable to perform them. The applicant bears the burden of proving, on a balance of probabilities, that they meet the test.
- [20] In the few months leading up to the accident, the applicant worked as a food delivery person at Skip the Dishes and as a driver with Uber. With either occupation, his duties were similar to that of a taxi driver, either transporting food or individuals from one location to another.
- [21] The applicant argued that he was unable to continue working because he was injured physically in the car accident and his pre-existing psychological injuries were worsened by the accident. He also argues that his license was revoked because of his psychological impairments, and he can no longer drive.
- [22] The applicant relies on the report dated July 2, 2021, of Dr. Getahun, an orthopedic surgeon, who opined that the applicant is not able to tolerate the required sitting, standing, lifting, or carrying required for his occupation. The doctor opined the restrictions are a direct result of the accident-related physical injuries to the cervical spine, thoracolumbar spine and left ankle. The applicant also relies on the report dated June 25, 2021, of Dr. Waisman, a psychiatrist, who opined that the applicant is restricted in his ability to attend work on a regular basis, deal with stress, and regulate his affect.
- [23] The respondent submits that the applicant has not produced any medical evidence to support his allegations regarding the injuries sustained in the accident. The respondent relies on the hospital records where the applicant only reported back pain. It also relies on the report dated May 14, 2021, of Dr.

Josefchak, an orthopedic surgeon, that opines the applicant could return to the essential tasks of his occupation because he sustained strains of the lumbar and cervical spine, possible right hallux rigidus and possible left Achilles' tendonitis.

- [24] I find the applicant is not entitled to an IRB because he has not produced enough medical records after the accident to demonstrate what injuries were caused by the accident or how the strains prevent him from working a sedentary to light-demand occupation.
- [25] Since I have already found that the applicant did not sustain any psychological injuries because of the accident, my analysis of the IRB will only centre on the physical injuries and whether they prevent him from returning to the essential tasks of his employment.
- [26] The Disability Certificate written by Hilary Aldworth on November 16, 2020, an occupational therapist, indicates that the applicant could not return to the essential tasks of his employment because of low back pain, upper and lower limb pain, and signs and symptoms involving his emotional state.
- [27] The applicant's ability to return to the essential tasks of his pre-accident occupation is based on the tasks and hours he was working just prior to the accident. Based on the summary of accepted tasks from Skip the Dishes in the months leading to the accident, the applicant worked very few shifts. In March 2019, he worked 9 days, in June 2019 he worked 7 days, in July 2019 he worked 6 days and in August he worked 2 days. In August 2019 he accepted and worked 3 ride shares with Uber. Although I do not have exact details regarding the number of hours he spent working each day, on the balance of probabilities, he worked no more than what would be average for part-time work.
- [28] Secondly, I find the injuries caused by the accident are minor. Both expert reports largely agree on the diagnosis of strains to the cervical and lumbar spine, left ankle sprains or tendonitis, and possible right hallux rigidus. The main difference is Dr. Getahun identified non-verifiable radicular symptoms.
- [29] I give little weight to Dr. Getahun's opinion that the applicant cannot return to the essential tasks of employment due to his accident-related physical impairments because the medical records do not support any impairments that would prevent him from working at his pre-accident occupation. After the accident, the initial hospital records from August 29, 2019, until October 10, 2019, indicate that he reported no pain. X-rays and CT Scans were taken with no evidence of fractures or injuries. A few days after admittance to the hospital he reported abdominal discomfort, which was evaluated, and he was medically cleared. He also reported slight back pain however, at the hospital, physical exams were completed with no diagnosis of any physical issues. Some neurological abnormalities were noticed, and potential diagnoses were due to vitamin

deficiencies. He also was seen during this time on many occasions by nurse practitioners over somatic complaints including abdominal pain, bleeding rectum, foot pain and plantar fasciitis. Based on the initial records, the applicant's only physical complaint in the first three months of the accident was back pain. No diagnoses were made by hospital medical personnel. I find that the applicant has nothing more than a back strain. On the balance of probabilities, a back strain should not prevent the applicant from performing the essential tasks of his pre-accident employment. He worked very limited hours in what is not considered a physically demanding job. At Skip the Dishes and Uber, he can pace himself, pick the tasks suitable for him, and space out his shifts to match the hours he was working pre-accident.

- [30] As a result, he is not entitled to an IRB as he has failed to demonstrate that he suffered a substantial inability to perform the essential tasks of his employment as a result of the accident.
- [31] Since the applicant is not entitled to a pre-104-week IRB, he has not established a basis for a post-104-week IRB since it is a more stringent and difficult test.

The applicant is not entitled to an occupational therapy treatment plan

- [32] The applicant provided no submissions on the occupational therapy treatment plan and why it should be considered reasonable or necessary for his accident-related injuries. As it is the applicant's burden to demonstrate that the treatment plan is reasonable and necessary, and where he provided no submissions on the same, I find the applicant is not entitled to the treatment plan.

Interest and Award

- [33] The applicant has requested interest and an award for the benefits being claimed. Since there is no entitlement to any benefits, no interest or award is owed.

ORDER

[34] The applicant has failed to prove that he is entitled to any benefits. Since no benefits are owed, he is not entitled to interest or an award.

[35] I order that the application be dismissed.

Released: June 23, 2023

Chloe Lester
Vice-Chair