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

Ontario

Tribunal File Number: 17-003342/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:

D. E.

Applicant

And

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Jeffrey Shapiro**

APPEARANCES:

For the applicant: Darryl Singer, Counsel, and

David Carranza, Paralegal

For the respondent: Emma Duggan, Counsel

Heard: **In-Person October 30, 2017 and Written Submissions Completed on November 24, 2017**

Overview

[1] Mr. E was injured in a motor vehicle accident on October 8, 2016. He applied for and received insurance benefits from Aviva Insurance Canada under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*").

[2] Mr. E initially returned to his employment, but claims he could not continue, and thus he is entitled to an income replacement benefit (IRB) from March 31, 2017 forward. Aviva disagreed and denied that benefit. Mr. E appealed to this Tribunal.

[3] An in-person hearing on that dispute was held before me, with the parties providing closing statements in writing.[1] The applicant and his family doctor testified on his behalf, while the insurer called an orthopedic surgeon and psychologist who had performed independent examinations (IEs) of Mr. E. The parties agree to the general timeline and law, but dispute the interpretation of key events.

[4] After considering the evidence, I conclude that the applicant does not suffer a "substantial inability" to perform his employment and is not entitled to the benefit.

Issues

[5] The issues I must decide are:

1. Is the applicant entitled to payment of an income replacement benefit in the amount of $400.00 per week from March 31, 2017 to date and ongoing?[2]

2. If so, is the applicant entitled to interest for the overdue payment of benefits?

Result

[6] The applicant is not entitled to an IRB. Thus, no interest is due.

Position of the Parties

[7] Mr. E submits that among other injuries, he suffered ongoing impairments to his neck, back, and shoulders from the accident. Although he initially managed to return to his pre-accident position of a cable repair technician on modified duties, he was unable to continue due to his accident related injuries – particularly his back injury – causing him to lose his job. His inability is supported by his family doctor. He contends that his prior back injury had healed prior to the accident, and that his current back pain is limited to the accident.

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[1] The parties agree the "Trial Brief of the Respondent, Aviva Ins." is a joint document book; some of the documents were marked as exhibits and entered into evidence. The September 28, 2017 letter by Aviva serves as the joint witness list. The parties called different witnesses than in the Case Conference Order, without objection.

[2] Mr. E's closing submissions limit the IRB sought to the two year mark.

[8] Mr. E further submits he should not be penalized for his “fortitude” in working through pain to support his family. While he is now receiving Employment Insurance (EI) benefits which require him to be able to work, and he admitted that if he was offered a job he would go back to work, he submits that doesn’t mean he’s properly able to do so - but rather reflects his responsibility to support his family.

[9] Aviva’s main submission is that Mr. E, his doctor and his claim lack credibility. Mr. E would have continued working had he not been terminated. IEs conclude that he is not impaired. His medical evidence is subjective and follows a pattern of inconsistent explanations during and about past events – including what Aviva describes as “a documented history of…unexcused absences from work, and…retroactively seeking medical reasons to support benefits claims”.

Background

[10] To understand the parties’ positions, a brief timeline is helpful. To start, Mr. E had a series of prior medical issues or injures, including an August 2010 motor vehicle accident where he injured his back; July 2013, July 2015 and September 8, 2016 workplace incidents; and other medical conditions. There are conflicting accounts if his back injuries had fully healed at the time of the accident.

[11] When this accident occurred on October 8, 2016, Mr. E was off work receiving WSIB benefits due to the September 8, 2016 incident, a hand injury. The WSIB benefits ended in December. Mr. E used some vacation-time, and then returned to work on December 29. The parties dispute if he returned on modified duties.

[12] A key event occurred on Friday, March 10, 2017. Mr. E argues he called in sick related to the accident.

[13] On Monday, March 13, 2017, Mr. E attended at his family doctor for a pre-scheduled check-up, and on March 14, 2017, he returned to work. On March 20, 2017, Mr. E was terminated at work for alleged insubordination of failing to attend work on the May 10 weekend. On March 21, 2017, Mr. E saw a doctor at his doctor’s clinic for a note relating to the March 10th absence. The record is unclear, but it appears his IRB claim begins on March 31 due to payment of unused vacation credits, and the IRB waiting period.

[14] On April 26, 2017, his family doctor issued a second Disability Certificate.

Law

[15] Sections 5 and 6 of the *Schedule* provide that after the first week of the accident related disability, an IRB of up to $400 per week is payable for the *first* 104 weeks when the insured person suffers "a substantial inability to perform the essential tasks" of the person's employment at the time of the accident.

[16] The parties agree that this case turns on Section 11. As applied to Mr. E's situation, it provides that Mr. E's return to work doesn't prevent him from seeking the IRB, so long as he was unable to *continue* his employment *as a result of the accident*.

[17] The parties also agree on principles from earlier cases interpreting those sections: (1) Mr. E must prove his entitlement on the balance of probabilities; (2) Because there is no objective evidence of impairment and/or the evidence does not explain the degree of pain, Mr. E's credibility becomes important; and (3) The test for entitlement isn't Mr. E's ability to do each of the physical demands of his position in insolation; it is whether Mr. E has the ability to do so on an ongoing basis.

Analysis – *Was Mr. E unable to continue his employment due to the accident?*

[18] I find that as of March 31, 2017, Mr. E has not established on the balance of probabilities that he suffers "a substantial inability to perform the essential tasks" of his pre-accident employment,[3] and thus he is not entitled to an IRB. I come to that conclusion as follows.

[19] First, as the parties agree, there is very little objective evidence of an impairment; thus, Mr. E's credibility becomes important. In fact, I find it to be the *central* issue of this claim – effecting his own testimony as well as the medical practitioners.'

[20] Second, in that regard, I find Mr. E's testimony, taken as a whole, inconsistent to the point of lacking credibility. When initially questioned by his own lawyer, Mr. E presented as a conscientious person, describing his medical history. He expressed that if offered his job back, though he felt physically unable to do so, he would have no choice but to make it work because of his financial situation. Leaving aside for a moment the issue of whether or not that answer might disqualify him from receiving an IRB, I found it to be an honest attempt to address a difficult point.

[3] As starting point, I find that Mr. E's position is a physically active position, with lots of bending, lifting and carrying. At times, it can involve ladder work, but does not appear to currently.

[21] During Aviva's questioning of Mr. E, however, a different picture emerged. Records presented to him regarding various injuries and claims established that he has given dramatically different explanations at different points in time or depending on with whom he was speaking. A few examples:

i. During his initial testimony and during his August 30, 2017 Examination Under Oath (EUO), he was clear that he fully recovered from a 2010 accident by 2011 and has not seen his doctor about it. Yet other recent records show that he has been emphatic that he was suffering ongoing issues from that accident, such as in his doctor's July 22, 2015 notation.

ii. During a March 24, 2017 psychological IE assessment, Dr. Nikkhou records that Mr. E advised he received physical therapy for 3-4 months from the 2010 accident, yet other records show he was off work for 11 months. During this same assessment, he omits to mention the 2013 and 2015 incidents. He describes attending physiotherapy for *this* October 2016 accident at rates inconsistent with the clinic's records.

iii. During Dr. Krievins's November 15, 2016 assessment of Mr. E's hand for the WSIB claim, Mr. E denied being involved in any previous work-related injuries – which is incorrect. He also appears to have not mentioned this accident which only occurred a *month* earlier, i.e. October 8, 2016.

[22] The applicant submitted that 2013 and 2015 workplace accidents were trivial aggravations of his lower back, yet both involved more than "trivial" time off of work. More significantly, those events follow a pattern of changing versions of events:

i. **2013:** From July 15, 2013 until August 13, 2013, Mr. E took off work and pursued a short term disability claim. His explanation about the cause and details of this time off work, however, significantly changed in the process.

   a. On July 16, 2013, he advised his supervisor that he would be off work due to back pain from a prior *non-work-related injury*. His doctor's note in support indicated symptoms started July 9, 2013.

   b. When his STD claim was denied on August 16, 2013, on August 21, 2013 he then reported to his employer that it was *work-related,* caused when he slipped while carrying a ladder.

   c. A November 7, 2013 doctor note states he took that time off for "back pain from mva 2010 not getting paid since he did not go for pt…".

ii. **2015**: Mr. E requested that his employer permit him time off from July 16 to July 20, 2015; the employer denied that request. Then, on July 14, 2015, Mr. E claimed he experienced pain in his back and was then off

work until July 27, 2015. When his employer investigated, he could not point to a specific event. In further contrast, a July 15, 2015 note of Dr. Hussein states “stooped at work felt a crack then pain….”.

[23] The third basis for my finding that Mr. E does not qualify for the IRB is that I did not find his medical evidence persuasive. He relied on the medical testimony of Dr. Sohaileh Hussein, his family doctor since 2010. While I disagree with Aviva’s characterization that Dr. Hussein is “not credible” – her testimony appeared credible and sincere – I ultimately do not find her testimony persuasive, as her treatment and conclusions are so heavily based on Mr. E’s self-reporting which I find strikingly inconsistent.

[24] Dr. Hussein testified that when she saw Mr. E for the September 2016 workplace injury – which was a soft tissue injury of his right hand – he had no back pain. He was also on medication for reflux, blood pressure, cholesterol, and diabetes, but nothing for back pain. She then saw him on October 11 or 12 following the October 8, 2016 motor vehicle accident at which point he had lower back pain, although in later visits he brought up neck pain and anxiety about driving.

[25] Her view was that back injuries can compound each other so that an injury such as this one could “trigger” earlier injuries of which he had two. Thus, while this accident might have been an injury that would normally be expected to resolve in 12 weeks, it’s not uncommon it would take longer because of prior conditions. Based on her clinical opinion as a treating physician, she felt he was unable to complete his job particularly when he is asked to climb power poles and the driving could be difficult. For treatment related to the accident, she referred him to physical therapy and prescribed Celebrex, an anti-inflammatory.

[26] Dr. Hussein saw the applicant on March 13, 2017 when he came in for a regular physical and to re-prescribe his regular medication, and at that time he mentioned his back pain. He wanted Tylenol-3 but she prescribed Tylenol-2. She recalled that she “believes so” that he had taken Friday off because of back pain, but didn’t think they had a further conversation about it at that time. She believed that he still has ongoing back issues as it takes a while to recover from the pain given his prior injuries, and that he’s a big man, and he’s back at work doing physical labour which would exacerbate his condition.

[27] During cross-examination, Dr. Hussein acknowledged that she spoke to Mr. E about the testimony to understand what the process was about – and I find nothing improper about doing so. When asked about numerous apparent inconsistencies in her records, I found her answers credible. For example:

i. Regarding the 2010 accident she felt that it resolved and that it was not constant but there were “flare-ups”.

ii. She explained that the January 2017 visit note with regard to the WSIB hand injury shows no mention of back pain is not an indication that he does not have any back pain, but only that it was not addressed at *that* visit. In fact for these types of matters, because of billing reasons, she tries to focus each visit on one ailment.

iii. She also explained that while there is no reference in her clinical notes to him missing work because of back pain on March 10, 2017, the fact he needed to miss work is mentioned in a disability certificate which was placed in Mr. E's file, and so there is no need to duplicate the notation.

[28] She notes that she did not send him to vocational testing about his ability to perform his employment, but felt she did not need to, and that she could offer her opinion based on common sense. I understood her reference to "common sense", also being a reference to her experience – and responsibility – in treating patients. I found that answer to make sense and had the impression that she was trying to answer questions honestly and fairly.

[29] Given that Mr. E's complaints are subjective, however, my ability to give substantial weight to her testimony is limited by the fact that she is relying on Mr. E self-reporting of his symptoms, which proved to be less than reliable.

[30] Fourth, the respondent called Dr. Esmat Dessouki, an orthopedic surgeon, who opined that Mr. E could return to work – and I found his testimony persuasive. Dr. Dessouki examined Mr. E on June 19, 2017. The doctor opined that Mr. E's examination was normal and the applicant's diagnosis was lumbar sacral strain noting that the applicant did "fairly well" recovering a month after the accident.

[31] The key point of Dr. Dessouki's testimony was that he found Mr. E's report of his pain at a 7 out of 10 overlaid against the fairly normal exam to be a "mismatch." He acknowledged that a patient may have good and bad days and that injuries can ebb and flow, but opined that fluctuations occur within a range. Thus, a patient experiencing a "7" would be expected to show some type of objective findings such as muscle spasms. He also noted that he did not give much consideration of the Functional Abilities Report, as it "didn't give me a red or green" light, and instead relied heavily on his own examination.

[32] Finally, Aviva called Dr. Mohammad Nikkhou, a psychologist, who conducted an assessment on March 24, 2017. I didn't find his psychological testimony particularly useful as Mr. E was not asserting a psychological claim, but it did have some relevance regarding the history provided to him by Mr. E, as indicated above.

Summary

[33] Mr. E has a physically active job, and I acknowledge that he may have back flare-ups from time to time – even possibly on March 10, 2017. However, given his conflicting accounts of various back injuries, several of which are noted above, he has not established on a balance of probabilities that (1) there was a flare-up 5 months after the accident on March 10, 2017, and (2) if there was, it was related to the accident, or (3) that it continued more than a day or two.

Conclusion

[34] The applicant is not entitled to an Income Replacement Benefit from March 31, 2017 to date or ongoing, or interest. The Appeal is dismissed.

Released: June 12, 2018

Jeffrey Shapiro, Adjudicator