

**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**

Date: 2017-10-27

Tribunal File Number: 16-003757/AABS

Case Name: 16-003757 v State Farm Mutual Automobile Insurance Company

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:

M. R.

Applicant

and

State Farm Mutual Automobile Insurance Company

Respondent

ADJUDICATOR: Cezary Paluch, Member

APPEARANCES:

For the Applicant:

M.R., applicant
Allan Blott Q.C., counsel
Carlyle Mazankowski, student-at-law

For the Respondent:

Nicholaus De Koning, counsel
Dunja Mullan, representative

Bengali Interpreter:

Anisa Khan

In-Person Hearing:

September 16, and 26, 2017¹

¹ The parties initially agreed to proceed by way of written submissions including half-day teleconference and one day in-person hearing. The Order of Adjudicator Flute dated June 30, 2017, ordered entire matter to be heard in-person.

OVERVIEW:

1. The applicant, M.R., was injured in a motor vehicle accident on September 16, 2013 when his vehicle was hit from behind. Prior to the accident, he was working at the same sheet material factory since July 2000. He applied for benefits under the Statutory Accident Benefits Schedule – Effective after September 1, 2010 (the “*Schedule*”). Following the accident, M.R. received income replacement benefits until October 27, 2015. On that day, State Farm Insurance Company (“State Farm”) terminated the applicant’s benefit. The applicant disputes this termination and submits that he should be paid an income replacement benefit from October 28, 2015, until such time as he continues to be entitled to the benefit under the *Schedule*.
2. The weekly amount of the income replacement benefit is not in issue. The only issue is entitlement and interest.

ISSUES:

3. Is the applicant entitled to receive a weekly income replacement benefit for the period from October 28, 2015, until such time as the applicant continues to be entitled to the benefit pursuant to the *Schedule*?
4. Is the applicant entitled to receive interest on the overdue payment of benefits?

RESULT:

5. The applicant is not entitled to receive income replacement benefits for the period sought. The applicant has not shown that he is completely unable to perform the essential tasks of his pre-accident employment.
6. The applicant is also not entitled to interest.

Issue # 1 – Income Replacement Benefits*Law*

7. There are two statutory tests for entitlement to an income replacement benefit. The first test is applicable for the initial period from one week after the date of the accident until the second anniversary. During this period, the applicant is entitled to be paid an income replacement benefit if he suffered a substantial inability to perform the essential tasks of his pre-accident employment. Following the accident, the applicant received income replacement benefits until October 27, 2015 when the benefit was terminated by the respondent as per the Explanation of Benefits (OCF-9) based on a determination that the applicant did not suffer a

complete inability to engage in any employment for which he was reasonably suited by education, training or experience.

8. Since October 28, 2015 is beyond the initial period of 104 weeks, the second test for entitlement for a post - 104 week income replacement benefit is applicable and set out in section 6(2)(b), which states: "*The insurer is not required to pay an income replacement benefit after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.*"
9. This is commonly referred to as the more stringent "complete inability test" or the "post-104 test". This is in contrast to the less onerous "pre-104 test" or the "substantial inability test."

Facts and Analysis - Post 104 Weeks

10. The onus in this case is important. The onus of proof rests on the applicant to prove on a balance of probabilities that he is entitled to the income replacement benefit under the *Schedule*². The applicant contends that he suffered both physical and psychological impairments as a result of the accident.
11. In support of his position, the applicant provided a Disability Certificate,³ two medical reports and a MRI Consultation Report. Dr. Anita Dyson, a chiropractor, prepared a Disability Certificate dated April 15, 2015. However, this Certificate addresses the test for the first 104 weeks – the "substantial inability to perform the essential tasks" of the person's employment at the time of the accident, not the test for the post 104 week period or the "complete inability test." The Disability Certificate diagnosed the applicant with:
 - Spain/Strain of Lumbar Spine
 - Sprain/Strain of Cervical Spine
 - Sprain/Strain Thoracic Spine
 - Sprain/Strain of Bilateral Shoulder Joint
 - Chest Contusion
 - Sprain/Strain of Right Wrist
 - Sprain/Strain of Bilateral Knee
 - Headaches and dizziness

² *16-000270 v Allstate Insurance Company of Canada*, 2017 CanLII 3144 (ON LAT) at paragraph 3.

³ There is mention in Dr. Kwok's Report of another Disability Certificate dated December 4, 2013 but this was not included as part of the Joint Document Brief.

12. The applicant retained Dr. Joseph Kwok, a physician with a specialty in orthopaedic surgery, to prepare a report on his condition. The report dated December 9, 2014, diagnosed the applicant with the following as a result of the motor vehicle accident:

- Sprain/Strain injury of both shoulders (possible rotator cuff injury);
- Contusion and sprain/strain injury of left and right extremities (with left and right elbow and wrist pain);
- Contusion and sprain/strain injury of left and right knees (possible internal derangement)
- Contusion and sprain/strain injury of left and right ankles.
- Myofascial (sprain/strain) injury of the spine.
- Musculoskeletal impairments.

13. Although I accept Dr. Kwok's diagnoses, as they are very similar to those of Dr. Edward English and consistent with the injuries set out in the Disability Certificate, I place limited weight on Dr. Kwok's report for the following reasons. First, and foremost, Dr. Kwok does not address the "complete inability test" rather opines only on the "substantial inability test." He has not addressed whether the applicant is suffering a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or experience. This is not surprising because Dr. Kwok's assessment was done on December 9, 2014 (about 3 months post-accident) so the 104 weeks post-accident had not lapsed for the complete inability test to be considered by Dr. Kwok. Unfortunately, there was no addendum or updated report provided that formed part of the record before me.

14. The second reason I give Dr. Kwok's report little weight is that on page 11 of his report, Dr. Kwok states that the applicant's musculoskeletal functional limitations "*may remain permanently.*" I fail to see how Dr. Kwok was able to come to such a far reaching conclusion less than 3 months after the accident regarding the applicant's musculoskeletal functioning based on only one meeting⁴ with the applicant. I also noted that in conducting his examination, Dr. Kwok did not have the benefit of any scans, radiographs or similar type assessment tools despite acknowledging that the applicant had radiographs done at the hospital but did not bring them. Third, Dr. Kwok concludes that there "*is no evidence of pain magnification.*" However, he does not provide any explanation as to how he came to this conclusion. Finally, I give Dr. Kwok's report little weight because he states that he reviewed the medical brief as part of his assessment but nowhere in his report does he specify what documentation formed part of his review.

⁴ The Introduction of Dr. Kwok's report states that he saw the applicant in his office on December 9, 2014. It does not mention that the physician saw him at any other time.

15. The applicant also provided his family doctor, Dr. Aziz's report dated September 27, 2016 in support of his claim. Dr. Aziz also testified at the hearing. In his report, Dr. Aziz diagnosed the applicant with chronic pain, whiplash, myofascial pain, stiffness and soreness, fibromyalgia, impaired lifting due to wrist pain, insomnia, stress and depression. In his testimony, Dr. Aziz also added the diagnosis of anxiety.
16. However, similar to Dr. Kwok's report, Dr. Aziz did not directly comment on the complete inability test. Dr. Azizi states that the applicant "*may not be able to find and/or to do job with similar expectations and performance at his pre-accident levels*" and "*given his mature age and language challenges, it will be tough for him to be retrained for other work within his medical limitations and to get appropriate job positions afterwards,*" but does not frame his conclusions in terms of the appropriate disability test. Moreover, Dr. Aziz uses very general or vague words like "may" or "psychological infirmities" and broad diagnosis like stress and impaired lifting due to pain. In my view, such language is indeterminate and uncertain. It is not specific enough. The diagnoses are not precise. It does not address if the applicant is suffering a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. More is required to allow the applicant to meet his evidentiary burden.
17. In his report, under the question of whether he could make any treatment recommendations to improve the applicant's prognosis, Dr. Aziz focused more about a return to work plan than treatment recommendation when he replied that "*permanent modified work can be considered at this juncture. He may benefit by vocational training for light duty desk job type of work, which in turn can minimize the chances of aggravation of backache.*" Similarly, in his testimony, Dr. Aziz opined that although the applicant may require a lot of accommodation from any prospective employer he stated that he may do some desk job and would recommend some casual employment or ad hoc spur of the moment employment. To me, Dr. Aziz's evidence supported the conclusion that the applicant was able to do some type of work and is able to engage in other suitable employment albeit with some accommodation.
18. The applicant also submitted a page Consultation Report regarding an MRI of his lumbar spine that was completed on September 10, 2014. This report confirms that at the L5 vertebral there is disc space narrowing, a mild disc bulge and disc protrusion. The applicant attributes this his back pain which he has suffered from the accident. State Farm takes issue with the results of the MRI being connected to the accident. There is also evidence in Dr. Kowk's report that the applicant reported that he injured his back at work in 2003. I assign no weight to the MRI Report because I cannot conclude that the changes in the MRI were caused, even materially, by the accident. There was no expert testimony to explain the results of the MRI or to connect it to the car accident. Indeed, when Dr. Aziz was

asked about the MRI report, he conceded he was not an expert in this kind of evaluation but offered his opinion that it is part of wear and tear although he would have expected someone a bit older (like a 60 year old) to have this type of injury.

19. The applicant testified that he has been working the same sheet material factory Don Park Inc. since July 2000. He was paid \$15.75/hour and worked 40 hours a week. He has not returned to his old job since the accident. He tried driving a taxi on one occasion. This information is also detailed in the Functional Capacity Report by Dr. George Semerdjian. Dr. Semerdjian is a chiropractor hired by State Farm to conduct a functional capacity evaluation on the applicant. Also, the Job Site Analysis/Physical Demands Analysis Report prepared by Karima Hassam, occupation therapist, explains that at the time of the accident although the applicant was employed as a "Boot Packer" he was asked to perform other job duties outside of this designation including operating machines and working at making tubes.
20. In addition to his full-time job, the applicant testified that in the past he has worked at several restaurants as a dish washer and kitchen helper. The applicant submits that he continues to suffer from chronic pain, including pain in his back, legs, knees, neck and wrists. Although the respondent conceded that there is some medical evidence that the applicant does have some residual chronic pain, however, such evidence is insufficient to draw the conclusion that the applicant has a complete inability to engage in any reasonable occupation. I agree. The post 104 test is a more rigorous test. My decision turns mainly that the applicant has not proven his case in respect of the applicant's ability or inability to perform any employment. Dr. Kwok, nor Dr. Aziz, did not directly comment on the complete inability test. Moreover, aside from some general references to depression or anxiety, there was no specific mental or psychological diagnosis by a qualified expert in this field that was offered by the applicant to support his case. Without a report, or credible testimony with appropriate conclusions, I am unable to conclude that the applicant is suffering a complete inability to engage in any employment or self-employment for which he is reasonably suited by education, training or experience.
21. Despite Dr. Kwok's and Dr. Aziz's diagnoses, the applicant's testimony did not support his inability to return to work or that his impairment was debilitating enough to support the relevant disability test.
22. My conclusion is reinforced when I look at the content of the assessment reports submitted by State Farm. Dr. English in his orthopaedic report of March 4, 2014 states that he has soft tissue injuries which have resolved and left him with a residual problem and he is very pain focused and protective. Dr. English concludes that there were no injuries from the accident preventing him from

working and from a musculoskeletal point of view, he can return to his employment which was assessed as a medium to heavy job.

23. From a psychological standpoint, Dr. Rubenstein in his report dated October 22, 2015, did not find a mental diagnosis as a direct result of the accident. The administration of the Structured Inventory of Malingered Symptomatology (SIMS) test supported a finding of symptom amplification. With respect to the complete inability test, Dr. Rubenstein concluded that the applicant does not suffer a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.
24. Finally, the insurer also conducted a vocational assessment by Ms. Cynthia Kresak to identify vocational alternatives for which the applicant is suited based on his level of skill, education and experience. Ms. Kresak listed several alternative suitable jobs the applicant could pursue employment in including food preparer and restaurant counter attendant. I note that the applicant's prior work experience has been in the restaurant industry.
25. I accept the results of Dr. English, Dr. Rubenstein and Ms. Kresak. Their respective assessments further convince me that the applicant has failed to prove his case on a balance of probabilities.
26. The applicant referred me to several decisions of the *Financial Services Commission of Ontario* (FSCO) to support his case. These decisions are not binding on the Tribunal. Moreover, my reading of these cases is that they are all distinguishable on the particular facts. I am not persuaded by any of them. Here, the applicant was diagnosed with mostly sprains and strains and little physical impairments. There was no report or evidence from a chronic pain specialist despite the applicant's complaints of constant pain. No medical doctor opined that the applicant has a complete inability to engage in any reasonably suitable occupation. He was never diagnosed by a qualified psychiatrist with a mental disorder. This is a starting point to connect the symptoms to the accident.
27. Accordingly, I find that the applicant has not shown on the balance of probabilities that he is unable to engage in any employment for which he is reasonably suited by education, training or experience, for the period October 28, 2015 onwards.

Issue # 2: Interest

28. Given my decision in finding that there are no benefits owing, the applicant's request for interest is denied.

CONCLUSION:

29. For the reasons set out above, my conclusions are as follows:

- a) The applicant is not entitled to an income replacement benefit from October 28, 2015, to the date of this decision.
- b) The applicant is not entitled to costs.

ORDER:

30. The Application is dismissed.

Released: October 27, 2017

Cezary Paluch, Adjudicator