Civil Resolution Tribunal

Date Issued: October 16, 2023

File: AB-2022-005488

Type: Accident Claims

Category: Accident Benefits

Civil Resolution Tribunal

Indexed as: *Yun v. ICBC*, 2023 BCCRT 880

BETWEEN:

KYUNG-AH KATHERINE YUN

APPLICANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Andrea Ritchie, Vice Chair

INTRODUCTION

1. This dispute is about entitlement to accident benefits. The applicant, Kyung-Ah Katherine Yun, was in a motor vehicle accident as a rear passenger on June 9, 2021. She says she suffered various injuries in the accident that have negatively impacted

her quality of life and her ability to work. The applicant says the respondent insurer, Insurance Corporation of British Columbia, should pay her $5,287 in health care and rehabilitation benefits, $49,817.60 in income replacement benefits, and $150,000 as permanent impairment compensation.

2. The respondent says it has funded all the applicant's health care treatments, and that she does not qualify for income replacement benefits or permanent impairment compensation.

3. The applicant represents herself. The respondent is represented by an authorized employee.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over accident claims brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(a) of the CRTA gives the CRT jurisdiction over the determination of entitlement to accident benefits.

5. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. Section 39 of the CRTA says that the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

ISSUES

8. The issues in this dispute are whether the applicant is entitled to payment for health care benefits, income replacement benefits, or permanent impairment compensation and, if so, how much.

BACKGROUND, EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the applicant must prove her claims on a balance of probabilities, meaning "more likely than not". While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.

10. As noted, the applicant was a backseat passenger involved in a motor vehicle accident on June 9, 2021 in Port Coquitlam, British Columbia. At the time, the applicant was undisputedly not working since having surgery on her neck in 2017.

11. As a result of the accident, the applicant says she suffered low back and neck pain with numbness in her hands. The applicant says her accident injuries have prevented her from returning to work post-surgery and have had a negative impact on her quality of life. She seeks payments for health care treatments, income replacement benefits, and permanent impairment compensation.

Health Care and Rehabilitation Benefits

12. As a result of the accident the applicant attended 7 rehabilitation treatments: 2 physiotherapy treatments and 1 kinesiologist appointment in July 2021, 2 physiotherapy treatments in March 2022, and 2 physiotherapy treatments in May 2022. It is undisputed that the respondent fully funded these treatments.

13. The applicant says she was told to stop treatment by her doctor, and asks the respondent to "pay out" the treatments she did not attend. I find the applicant is referring to the Pre-Authorized Treatments for Health Care Services listed in Table 1 of Part 5 of the *Enhanced Accident Benefits Regulation* (EAB). Table 1 provides a list of health care services, the number of treatments that are "pre-approved" by the respondent insurer for accident-related injuries, and the accompanying maximum value payable for each treatment.

14. The applicant argues that as she only used 7 treatments, she should be paid out in a lump sum for all the treatments she is otherwise entitled to as pre-authorized treatments, for a total of $5,287 for 12 acupuncture treatments, 25 chiropractic treatments, 11 kinesiologist treatments, 12 massage therapy treatments, and 19 physiotherapy treatments.

15. ICBC argues health care benefits under the EAB are not paid out as a lump sum and instead are paid or reimbursed as the expenses are incurred. I agree.

16. Section 123(1) of the *Insurance (Vehicle) Act* (IVA) says that an insured is entitled to the payment or reimbursement of reasonable expenses incurred for, among other things, necessary health care services. EAB section 19(2) says an insured is entitled to payment or reimbursement under section 123(1) only if the health care is provided by an authorized care provider, using evidence-informed practice. EAB section 4(a) says the health care services set out in Table 1 are payable if they are provided by the applicable health care practitioner.

17. I find nothing in the relevant legislation provides for an insured to be paid for treatments they do not, or cannot, attend. On that basis, I dismiss the applicant's claim for general health care benefits.

Income Replacement Benefits

18. In the Dispute Notice, the applicant initially claimed $49,817.60 as income replacement benefits. However, in her submissions, she amended this total to $44,997.12.

19. The applicant was formerly a temporary worker with Canada Post. In 2015, the applicant suffered a disc herniation and underwent surgery in November 2017. The applicant has not worked with Canada Post since 2015.

20. The applicant argues that just prior to the June 9, 2021 accident, she was preparing to return to work after recovering from surgery for 4.5 years. She says she had ordered her new uniforms, but did not yet have a start date. Ultimately, she did not complete her return to work. She was required to provide medical clearance forms by June 14, 2021, which she undisputedly did not do. She says she did not do so because of the accident, but says the fact she ordered uniforms is sufficient to show she was going to return to work. So, she argues she is entitled to income replacement benefits from July 2022 to May 2023.

21. The respondent says the applicant does not fit any of the definitions of insureds who would qualify for income replacement benefits under the IVA. In the alternative, the respondent says the applicant was a "non-earner" at the time of the accident, which is defined by section 113 of the IVA as an insured who does not hold employment at the time of the accident, but is able to work.

22. The IVA and *Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation* (IRB) set out an insured's entitlement to income replacement benefits. Division 6 of the IVA provides that full-time earners, temporary and part-time earners, and non-earners are entitled to income replacement benefits if they fit the required criteria. There is no dispute the applicant was not a full-time earner, temporary earner, or part-time earner.

23. Based on the evidence before me, I also find the applicant was not a non-earner at the time of the accident. Although the applicant argues she was set to return to work, I find that is inconsistent with the evidence. In an April 2021 email to her supervisor, the applicant advised she was "planning to try to get clearance" to start work in the summer or beginning of fall. I find the applicant's return to work before the accident was uncertain at best, given she did not have medical clearance to return at that time. The fact she ordered uniforms is not determinative. In short, I find there is insufficient

evidence to show that the applicant was “able to work” at the time of the accident. So, I find she does not fit within the definition of a “non-earner”.

24. Section 145 of the IVA says that an insured who, before the accident, is regularly incapable of holding employment for any reason except age is not entitled to income replacement benefits. I find the applicant was incapable of holding employment due to her previous disc herniation and subsequent surgery. So, I find the applicant is not entitled to income replacement benefits under the IVA or IRB. I dismiss this aspect of her claim.

Permanent Impairment Compensation

25. The applicant says her accident injuries cause her difficulty in her everyday life. She says she struggles with going to appointments, doing daily activities such as cooking, cleaning, and taking her dog for walks. She says she is in constant pain and has numbness. As noted, she claims $150,000 as permanent impairment compensation.

26. The respondent says the applicant does not qualify for permanent impairment compensation.

27. Section 129(1) of the IVA says if an insured suffers a permanent impairment from an accident, the insured is entitled to a lump sum payment for the permanent impairment. Section 129(2) requires the respondent to calculate and determine the compensation an insured is entitled to, according to the regulations.

28. The applicable regulation is the *Permanent Impairment Regulation* (PIR). Section 10(1) of the PIR says an impairment is “permanent” when, following a “period of time sufficient for optimal tissue repair”, the impairment has become static, has stabilized, or is unlikely to change significantly with further therapy. Section 10(2) says the respondent must not pay compensation until the impairment is permanent.

29. The most recent medical evidence before me is from July 2022, over a year ago.

30. In a July 7, 2022 neurological report, Dr. Julian Lee examined the applicant and found “some of” her increased neck and shoulder pain was musculoskeletal in origin, and

recommended physiotherapy. Dr. Lee stated the applicant's neurological exam was normal.

31. In a July 28, 2022 GP Reassessment Medical Report, the applicant's family physician, Dr. Stephen Milne, noted the applicant was complaining of right and left neck and right lower back pain, with weakness in both upper limbs, worse on the left, and numbness in her right leg. On examination, Dr. Milne recorded normal gait, normal range of motion in her arms, normal reflexes, and decreased range of motion in her neck. He diagnosed her with a bilateral "acute on chronic neck injury". Dr. Milne further reported that the applicant was "waiting for further testing" and that an MRI was required to determine "vulnerability of C-spine" and whether she would require a further surgery. Dr. Milne advised to hold off on physiotherapy until further "neurological clearance".

32. It is unclear from Dr. Milne's report what further testing the applicant was waiting for, given the neurological testing earlier in July was normal. In any event, I find the applicant has not provided any evidence showing her accident injuries are static, stable, or unlikely to improve with further treatment. In fact, Dr. Lee recommended physiotherapy, and Dr. Milne questioned whether further surgery is necessary.

33. As noted above, to successfully claim for permanent impairment compensation, the applicant must show that it is more likely than not that her accident injuries are "permanent" as defined by section 10(1) of the PIR. I find she has not done so. I dismiss her claim for permanent impairment compensation at this time. Nothing in this decision prevents the applicant from reapplying for permanent impairment compensation if and when her accident injuries become permanent.

Family and Caregiver Benefits

34. In her submissions the applicant argues she helps with her elderly and ill in-laws, as well as her disabled spouse. She says caring for them has become more difficult since the accident as she is in constant pain. The respondent says the applicant does not qualify for any caregiver benefit.

35. Though this claim was not initially included in the Dispute Notice, the respondent had an opportunity to consider it and provide evidence and submissions about it, which it did. So, I find there is no prejudice to the respondent, and that I am able to consider the applicant's claim for entitlement to family and caregiver benefits.

36. Section 152(1) of the IVA says that an insured, who is not otherwise a full-time earner, temporary earner, student or minor, whose main occupation at the time of the accident is taking care of one or more persons who are regularly unable to hold employment, is entitled to a caregiver benefit if the insured is unable to continue providing care because of their accident injuries.

37. Here, apart from the applicant's submissions that she "helps with her elderly and ill in-laws", and that her spouse is disabled, the applicant provided no evidence to support that she has been unable to continue in this capacity, though she says it is "more difficult". I find this does not satisfy section 152(1), which says the insured is entitled to a caregiver benefit if they are "unable to continue" providing that care. I find the applicant has not proven she is entitled to any caregiver benefit. I dismiss this aspect of the applicant's claim.

FEES, EXPENSES AND INTEREST

38. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. The applicant was unsuccessful but did not pay any tribunal fees. As the respondent was successful, it is entitled to reimbursement of the $25 it paid in tribunal fees. Neither party claimed dispute-related expenses.

ORDERS

39. Within 30 days of the date of this decision, I order the applicant to pay the respondent a total of $25, as reimbursement for tribunal fees.

40. I dismiss the applicant's claims.

41. The respondent is also entitled to post-judgment interest under the *Court Order Interest Act*.

42. Under section 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia or the Provincial Court of British Columbia if it is under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Andrea Ritchie, Vice Chair