



Civil Resolution Tribunal

Date Issued: May 19, 2022

File: VI-2021-004800

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Lu v. Chow*, 2022 BCCRT 596

B E T W E E N :

WEIXIN LU

APPLICANT

A N D :

PUI CHI CHOW

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kristin Gardner

INTRODUCTION

1. This dispute is about a motor vehicle accident that took place on December 4, 2019 in Vancouver, BC.
2. The applicant, Weixin Lu, was a pedestrian walking north on Willow Street between West Broadway and West 8th Street. The respondent, Pui Chi Chow, was parking his

van on Willow Street, when he over-steered while in reverse and his van went up over the curb and struck Mr. Lu. Mr. Chow admits that the accident was his fault.

3. Mr. Lu was injured when Mr. Chow's vehicle hit him. The only issue in this dispute is what damages Mr. Lu is entitled to for his injuries. Mr. Lu claims a total of \$45,700, including \$5,500 for non-pecuniary damages (pain and suffering), \$35,000 for past income loss, and \$5,000 for out-of-pocket expenses.
4. Mr. Chow does not disagree with Mr. Lu's \$5,500 claim for non-pecuniary damages. However, Mr. Chow says Mr. Lu has provided insufficient documentation of his claimed income loss, and no evidence in support of his claim for out-of-pocket expenses.
5. Mr. Lu is self-represented. Mr. Chow is represented by his insurer, Insurance Corporation of British Columbia (ICBC).

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over motor vehicle injury disputes, or "accident claims", brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(b) of the CRTA gives the CRT jurisdiction over the determination of whether an injury is a "minor injury" under the *Insurance (Vehicle) Act* (IVA). Section 133(1)(c) of the CRTA and section 7 of the *Accident Claims Regulation* (ACR) give the CRT jurisdiction over the determination of liability and damages claims, up to \$50,000.
7. At the time Mr. Lu filed his CRT dispute, there was an ongoing legal challenge about whether sections 133(1)(b) and (c) of the CRTA were constitutional. The British Columbia Supreme Court (BCSC) had ordered that those sections were unconstitutional and no longer in effect. The British Columbia Court of Appeal (BCCA) then granted a partial stay of the BCSC decision, which allowed the CRT to continue resolving claims under these CRTA sections while the challenge was heard at the BCCA.

8. The CRT provided Mr. Lu with information about the BCSC's decision and the BCCA's partial stay. The CRT asked Mr. Lu whether he wanted to continue with the CRT dispute or file a court proceeding instead. Mr. Lu chose to continue at the CRT.
9. On May 12, 2022, the BCCA overturned the BCSC's decision. This means the CRT retains exclusive jurisdiction to resolve claims under sections 133(1)(b) and (c) of the CRTA. However, given Mr. Lu already consented to continuing his dispute at the CRT, nothing turns on the BCCA's latest decision.
10. 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.
11. 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.
12. 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. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
13. Both parties submitted late evidence after the CRT's deadline, but before submissions were complete. Mr. Wu also submitted additional late evidence after the parties had completed their submissions. Each party had the opportunity to review and respond to the other's late evidence, including Mr. Wu's post-submissions evidence. Bearing in mind the CRT's flexible mandate, I admit the late evidence.

14. During the CRT's tribunal decision process, ICBC, on behalf of Mr. Chow, advised CRT staff that it intended to claim a deduction from Mr. Lu's damages award under the *Insurance (Vehicle) Act* (IVA). The IVA prohibits a party from telling the tribunal member details about any deduction until after the tribunal member has assessed damages. CRT staff informed me that the respondent intended to claim a deduction, but not the type of deduction or the amount.
15. After reviewing the evidence and submissions about damages, I advised the parties through CRT staff of my damages assessment and asked for submissions about the claimed deductions. ICBC then confirmed it would not be claiming any deduction from the damages awarded, so it was unnecessary to obtain Mr. Lu's submissions on the issue.

ISSUES

16. The issues in this dispute are:
 - a. To what extent, if any, is Mr. Lu entitled to \$35,000 for past income loss?
 - b. To what extent, if any, is Mr. Lu entitled to \$5,000 for out-of-pocket expenses?

BACKGROUND, EVIDENCE AND ANALYSIS

17. In a civil claim such as this, Mr. Lu as the applicant, bears the burden of proof on a balance of probabilities. 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.
18. As noted, there is no dispute that Mr. Chow was liable for the December 4, 2019 accident, and that Mr. Lu suffered injuries from the accident. The ambulance and hospital records from the accident date state that Mr. Lu was struck from behind by a vehicle reversing into a parking spot and fell, hitting his head. These records also state Mr. Lu complained of nausea, right-sided neck pain, occipital pain, right hip and leg pain, and he had an abrasion on his right elbow.

19. The medical records in evidence show Mr. Lu attended several family medicine clinics in the months following the accident. These records show Mr. Lu was diagnosed with a whip lash injury. He suffered from ongoing neck pain and lower back pain and was prescribed physiotherapy, massage therapy, and naproxen for pain relief. In an April 20, 2020 medical visit record, Mr. Lu made his first complaint of psychological injury from the accident. He reported anxiety and irritability, disrupted sleep, and a poor appetite. He received a prescription for psychological counselling. The records show Mr. Lu's psychological symptoms persisted, including reported nightmares, to August 10, 2021, which is the most recent medical visit in the records before me.
20. As noted, Mr. Lu submits he is entitled to \$5,500 for non-pecuniary damages. This amount is the applicable cap for a "minor injury" as defined in the IVA. The parties did not expressly agree that Mr. Lu's injuries are "minor injuries" as defined in section 101 of the IVA. However, given Mr. Chow does not disagree with Mr. Lu's claimed non-pecuniary damages and they are within the applicable "minor injury cap", I do not need to determine whether the injuries are in fact "minor injuries". Given the medical evidence of Mr. Lu's injuries, and because the parties essentially agree on the amount, I find Mr. Lu is entitled to the claimed \$5,500 for non-pecuniary damages.
21. I turn then to Mr. Lu's wage loss claim.

Income loss

22. At the time of the accident, Mr. Lu was working full-time (40 hours per week) as a security guard for Fusion Security Inc. (Fusion). He had been employed with Fusion since May 2019. It is undisputed that Mr. Lu earned \$15 per hour, plus 4% vacation pay, and his overtime rate was \$22.50 per hour.
23. Mr. Lu was on a break during his workday when the accident happened. Mr. Lu's Fusion employment records suggest that he missed the remaining 1.5 hours of his December 4, 2019 shift due to the accident, which would equal \$22.50 in wage loss. However, Mr. Lu says he had agreed earlier that day to extend his shift by 2 hours, which is not seriously disputed. On balance, I accept Mr. Lu's evidence that had he

not been involved in the accident, he would have worked an extra 2 hours on December 4, 2019, paid as overtime, which equals \$45. So, I find Mr. Lu lost \$70.20 in wages on December 4, 2019 (\$22.50 + \$45 + 4% vacation pay).

24. The records show, and it is undisputed, that as a result of his accident injuries Mr. Lu took an additional 6 days off work following the accident. So, I find he lost a further \$748.80 in wages from December 5 to December 13, 2019, for a total gross wage loss of \$819.
25. Section 98 of the IVA says that a person who suffers a loss of income as a result of an accident, can only recover their net income loss as damages. This means the award for past income loss must be reduced by the amount of income tax and Employment Insurance (EI) premiums payable on that income: see *Moore v. Brown*, 2009 BCSC 190 at paragraph 6. The parties both use a 20% deduction to calculate the net loss, which I find is reasonable in the circumstances. On that basis, I find Mr. Lu's net wage loss to December 13, 2019 was \$655.20.
26. However, that is not the end of the matter. Mr. Lu also argues that after returning to work, his injuries impacted his job performance, resulting in further income loss from several sources. First, Mr. Lu says his injuries prevented him from accepting overtime opportunities. Second, he says his injuries affected his job performance and ultimately contributed to Fusion firing him in September 2020 and his being unable to secure alternative employment. Third, Mr. Lu says his injuries prevented him from operating his own company, Glory Security Services Ltd. (Glory), so he lost clients and ultimately had to close the business.
27. The difficulty for Mr. Lu is that the medical records before me do not support his claim that his injuries impacted his ability to perform his job duties. The medical records show that on December 9, 2019, a doctor recommended Mr. Lu take one week off work. However, Mr. Lu returned to the medical clinic the next day asking to return sooner. While I acknowledge that Mr. Lu says he wanted to go back to work only because he had to support his family, the medical records note that the doctor did not see any barrier preventing Mr. Lu from returning to work, given his reported job duties

and the doctor's physical examination showing no limitations in Mr. Lu's active range of motion on December 10, 2019.

28. Further, in a January 13, 2020 GP Extended Medical Report sent to ICBC, Dr. Jordan Sugie noted that while Mr. Lu had some ongoing right trapezius and right lumbar soft tissue tenderness, he was "fully back to work full duties". Contrary to Mr. Lu's submission, I find there is no evidence in the records that his doctor recommended he not stand for more than one hour or carry more than 5 pounds. I also find Mr. Lu did not report to his doctors that he experienced any physical difficulty with his job duties or any side effects from medication he was taking, as alleged.
29. I find there is also no evidence in the employment records that Mr. Lu's injuries impacted his ability to work as a security guard. There is no mention of Mr. Lu's injuries in Fusion's records after his return to work in December 2019. Contrary to Mr. Lu's submission, I find there is also nothing in the evidence that indicates he took time off from work to attend medical or treatment appointments.
30. The Fusion records do record some issues with Mr. Lu's performance after the accident, including not wearing a proper uniform and failing to take proper notes during his shift. However, I find Fusion had documented the same notetaking issues before the accident. Further, while Mr. Lu was relocated to a different job site at the end of January 2020 because a client did not want him working at their site anymore, the records do not say what the specific issue was, and Mr. Lu does not explain what happened. So, on balance, I find there is insufficient evidence to conclude that Mr. Lu's injuries were responsible for any post-accident job performance issues.
31. As noted, Mr. Lu says his injuries prevented him from accepting overtime opportunities. He estimates he lost about \$1,000 per month in overtime pay between December 2019 and May 2020. However, there is no record of any instances where Mr. Lu was offered an overtime shift and declined it after the accident. Further, the Fusion records show he worked only a total 46.83 overtime hours from his start date in May 2019 to the date of the accident (equaling \$1,055.13 in income over 6 months). I find this shows Mr. Lu was not working overtime with any regularity. I also find the

records show Mr. Lu worked 15 hours of overtime in January 2020, and a further 8 hours of overtime in April 2020. On balance, I find there is insufficient evidence to conclude Mr. Lu lost any overtime opportunities between December 2019 and May 2020 due to his injuries.

32. Mr. Lu was then off work from Fusion between May 21, 2020 and August 4, 2020, which his record of employment (ROE) states was due to a shortage of work. Mr. Lu says that Fusion would not have chosen to lay him off during the COVID-19 pandemic if he had not been injured. I find the records do not support that submission. The Fusion records show that Mr. Lu was between job sites for a few days in May 2021, though Fusion continued to offer Mr. Lu some coverage shifts while a more permanent assignment could be arranged. In the meantime, Mr. Lu advised Fusion that he had applied for the Canada Emergency Response Benefit (CERB), and he specifically asked Fusion to issue an ROE indicating a shortage of work, in order to complete his CERB application. Therefore, I find Mr. Lu requested the lay-off, and I do not accept his submission that he did so because of his injuries.
33. The Fusion records show that after returning to work in August 2020, he was fired for cause on September 4, 2020 because he repeatedly “abandoned” his assigned post. The records also contain a September 3 letter Mr. Lu wrote, in which he essentially admits to regularly leaving his shift early because he did not think it was necessary to stay after the site’s employees had left for the night and the building was secure. I find there is insufficient evidence that this error in judgment was related to Mr. Lu’s physical or psychological injuries from the accident. On balance, I find Mr. Lu has not established that his injuries contributed to losing his job with Fusion.
34. Mr. Lu then obtained employment with Armour Security & Protection Services (Armour), as of October 27, 2020. Mr. Lu provided no evidence about the number of job applications he submitted between September 4, 2020 and obtaining the job with Armour. I do not accept Mr. Lu’s unsupported submission that several potential employers refused to hire him because they “heard” he had been injured in a recent

accident. Overall, I find Mr. Lu has not established that his injuries delayed his ability to secure new employment after leaving Fusion.

35. I turn then to Mr. Lu's alleged loss of business income from Glory. Mr. Lu did not explain what services Glory provided, who its clients were, or how and when it generated revenue. The only evidence Mr. Lu provided about this company was 2 Canada Revenue Agency (CRA) assessments. He provided no other financial statements for the company. The CRA assessments show Glory earned \$11,068 in revenue for the tax year ending on August 31, 2019, which dropped to \$0 in revenue for the tax year ending on August 31, 2020. Mr. Lu says he was forced to close the business in September 2020 because he could no longer operate it due to his injuries.
36. I note that Glory's revenue reported for tax purposes is not necessarily equal to the business income Mr. Lu might have earned from the company. In any event, while Mr. Lu says he planned to expand his business by developing more clients in 2019 to 2020, there is no evidence that Glory earned any revenue after Mr. Lu started working full-time for Fusion in May 2019. Further, based on the CRA assessments, I find Glory earned no revenue in the 3 months before Mr. Lu's accident.
37. Mr. Lu says that Glory lost clients because he was unable to drive long distances to meet with them. Mr. Lu did not provide any statements from previous clients to support his submission. He relies on 2 witness statement from his friends, CL and LZ, who both state he could not drive to visit Glory's clients, resulting in a loss of business income. However, I find both statements appear to be based entirely on what Mr. Lu told them about his ability to drive. I also find the 2 statements are very similar and include several identical passages. On balance, I find Mr. Lu likely prepared the statements for CL and LZ. Overall, I place no weight on these statements, particularly as they relate to Mr. Lu's alleged losses from Glory.
38. I also find none of the medical records suggest Mr. Lu reported experiencing any physical difficulty with driving. The psychological counselling records indicate that Mr. Lu reported worrying about his physical safety while driving, but they do not suggest that anxiety prevented him from driving long distances.

39. Significantly, Mr. Lu did not explain how the COVID-19 pandemic might have impacted his ability to meet with clients in 2020 or Glory's alleged expansion plans. I find there is insufficient evidence to conclude that Mr. Lu's injuries resulted in Glory losing clients or revenue or prevented Mr. Lu from growing the company. I find Mr. Lu's claimed income loss from Glory is unproven.
40. I note that Mr. Lu submits generally that his job performance suffered due to side effects from the medications he took and symptoms of his psychological injury, such as difficulty sleeping and driving anxiety. While I acknowledge that such factors could possibly impact the quality of a person's work, Mr. Lu has simply provided insufficient evidence to conclude that was the case for him. Most notably, he did not provide an opinion from a doctor, medical professional, or vocational expert, that his medication or psychological symptoms impacted his ability to work such that he lost income or the ability to earn income.
41. Finally, I note that Mr. Lu submits he will incur future income loss because his injuries continue to affect his ability to competitively perform his job duties. He did not say whether he was referring specifically to his physical or psychological injuries, or both. In any event, given I have found Mr. Lu's injuries did not impact his capacity to earn business and employment income in the past, and in the absence of any expert evidence explaining how his injuries will impact his ability to earn income going forward, I find Mr. Lu has not proven a future loss of earning capacity.
42. Given my conclusions above, I find Mr. Lu's proven income loss is limited to \$655.20.

Out-of-pocket expenses

43. As noted, Mr. Lu claims \$5,000 for out-of-pocket expenses, which he says is for treatment, medications, medical supplies (such as bandages and a neck brace), transportation expenses (transit fares, carpool payments, and company mobile vehicle pick-ups), and travel time. He did not provide any breakdown of these claimed expenses.

44. ICBC provided its file notes showing it issued a \$67.97 payment to Mr. Lu on August 4, 2020 for reimbursement of prescription and over-the-counter medications. It also provided a screenshot of other medical payments, which I infer were made directly to providers for treatment such as psychological counselling.
45. Mr. Lu provided an August 3, 2020 receipt for Naproxen totaling \$6.08, which I find was not included in ICBC's reimbursement cheque. He also provided receipts showing he paid \$30 each for 2 medical notes relating to his time off and return to work following the accident. I find Mr. Lu is entitled to reimbursement of \$66.08 for these expenses, which I find were reasonable. Mr. Lu did not provide evidence of any expenses for medical supplies, so I find they are unproven.
46. The only other receipt Mr. Lu provided that ICBC did not reimburse was a \$77.70 expense for massage therapy. However, the receipt indicates the charge was for a "no show", and ICBC's file notes say that Mr. Lu did not attend the appointment because he was late due to traffic. Under the circumstances, I find Mr. Lu is not entitled to reimbursement of this expense.
47. While Mr. Lu provided a printout of his transit compass card usage, he did not explain how the dates and transit usage related to his injuries. I find he has not established that taking transit was necessary. Mr. Lu also did not explain the referenced carpool payments or company mobile vehicle expenses. On balance, I find Mr. Lu has not proven his claim for travel time or transportation expenses.

Summary

48. In summary, I award Mr. Lu \$5,500 for non-pecuniary damages, \$655.20 for wage loss, and \$66.08 for out-of-pocket expenses. This totals \$6,221.28 in damages.
49. As noted, the respondent ultimately did not seek any deductions to this award under the IVA, so I have made none.

FEES, EXPENSES AND INTEREST

50. The *Court Order Interest Act* applies to Mr. Lu's wage loss and out-of-pocket expenses. I find he is entitled to pre-judgment interest on his wage loss calculated from December 13, 2019, and on his out-of-pocket expenses from the date they were each incurred. This equals \$13.79.
51. Further to section 2 of the *Court Order Interest Act*, pre-judgment interest must not be awarded on non-pecuniary damages resulting from personal injury, or on costs (CRT fees and dispute-related expenses). Therefore, Mr. Lu is not entitled to pre-judgment interest on the \$5,500 pain and suffering award, or on the reimbursement of his paid CRT fees that I address below.
52. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As Mr. Lu was partially successful, I find he is entitled to half of his \$175 in paid CRT fees. ICBC paid \$75 in CRT fees on behalf of the respondent, who I find was also partially successful. So, I find Mr. Lu is entitled to \$50, as the net award for CRT fees.
53. Neither party claimed any dispute-related expenses.

ORDERS

54. Within 30 days of the date of this decision, I order the respondent, Mr. Chow, to pay the applicant, Mr. Lu, a total of \$6,285.07, broken down as follows:
- a. \$6,221.28 in damages,
 - b. \$13.79 in pre-judgment interest on wage loss and out-of-pocket expenses under the *Court Order Interest Act*, and
 - c. \$50 in CRT fees.
55. Mr. Lu is also entitled to post-judgment interest, as applicable.

56. 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.

Kristin Gardner, Tribunal Member