Civil Resolution Tribunal

Date Issued: May 15, 2023

File: VI-2021-007399
and VI-2021-007492

Type: Accident Claims

Category: Minor Injury Determination
and Fault & Damages

Civil Resolution Tribunal

Indexed as: *Silver v. All-West Heritage Glass Ltd.*, 2023 BCCRT 407

BETWEEN:

KARMON SILVER

APPLICANT

AND:

ALL-WEST HERITAGE GLASS LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Andrea Ritchie, Vice Chair

INTRODUCTION

1. This decision is about a motor vehicle accident on July 28, 2020 involving the applicant, Karmon Silver, and a vehicle owned by the respondent, All-West Heritage

Glass Ltd. RJ, a third party, was the driver of the respondent's vehicle at the time. RJ is not a party to these disputes.

2. The applicant filed two related accident claims disputes with the Civil Resolution Tribunal (CRT): (1) a request that the CRT determine whether the applicant's injuries are "minor injuries" under the *Insurance (Vehicle) Act* (IVA) (dispute VI-2021-007399), and (2) a claim for personal injury damages (dispute VI-2021-007492).

3. The Insurance Corporation of British Columbia (ICBC) insures both parties. ICBC is not a party to either of the disputes that are the subject of this decision.

4. The applicant argues her injures are not minor, and initially sought $50,550 in personal injury damages, including $40,000 for non-pecuniary (pain and suffering) damages, $10,000 for special damages (out-of-pocket expenses), and $550 for damage to her truck. The CRT's monetary limit for liability and damages claims within its accident claims jurisdiction is $50,000. The applicant was informed about this limit and agreed to abandon her claim for the truck damage.

5. The respondent says the applicant's injuries are "minor injuries", and argues the applicant's non-pecuniary damages are therefore limited to the $5,627 "minor injury cap". The respondent also says the applicant has not proven any entitlement to special damages.

6. The applicant is self-represented. The respondent is represented by an authorized ICBC employee.

JURISDICTION AND PROCEDURE

7. These are the CRT's formal written reasons. 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 exclusive jurisdiction over the determination of whether an injury is a "minor injury" under the *Insurance (Vehicle) Act*. 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.

8. 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.

9. 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 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.

10. 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.

Deductions

11. During the CRT's tribunal decision process, on the respondent 's behalf ICBC advised CRT staff that it intended to claim a deduction from the applicant's damages award under section 83 of the 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.

12. After reviewing the evidence and submissions about damages, I advised the parties through CRT staff of my damages assessment and asked for evidence and submissions about the claimed deductions and the basis for those deductions, which were provided. My decision about deductions is discussed below.

ISSUES

13. The issues in this dispute are:

    a. Whether the applicant's injuries are "minor injuries" as defined by section 101 of the IVA, and

    b. To what extent the applicant is entitled to her claimed damages.

BACKGROUND, EVIDENCE AND ANALYSIS

14. 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.

15. As noted, the applicant was rear-ended in a motor vehicle accident on July 28, 2020. There is no allegation the applicant was responsible for the accident. It is also undisputed the applicant was injured as a result of the accident. She argues her injuries are not minor and seeks $40,000 in non-pecuniary damages, plus $10,000 in special damages.

16. The respondent says the applicant's injuries fall within the definition of a "minor injury", and that the applicant's non-pecuniary damages should be limited to the applicable legislated "minor injury cap" of $5,627.

Minor Injury Determination

17. For the minor injury determination dispute, section 101 of the IVA and section 2 of the *Minor Injury Regulation* define a "minor injury" as including, among other things, sprains or strain, pain syndromes, a concussion that does not result in an incapacity, and whiplash-associated disorder (WAD) injuries.

18. Section 101 of the IVA further says that a "minor injury" includes a physical or mental injury that does not result in a "serious impairment" or a "permanent serious disfigurement".

19. A "permanent serious disfigurement" means something that significantly detracts from the applicant's physical appearance. There is no indication the applicant claims a permanent serious disfigurement from the July 28, 2020 accident.

20. A "serious impairment" means a physical or mental impairment that is not resolved within 12 months after the date of the accident, **and** "meets prescribed criteria".

21. *Minor Injury Regulation* section 3 sets out the "prescribed criteria" for a serious impairment. It says that the impairment must result in a "substantial inability" to perform the essential tasks of the applicant's regular employment or education program, or their activities of daily living. The impairment must be caused by the accident, be ongoing since the accident, and not expected to improve substantially.

22. As a result of the accident, the applicant says she suffered left arm pain and that her arm goes "dead" at times, ongoing neck and back pain, and daily shoulder pain. She also says she has nerve pain. The applicant argues her accident injuries are negatively impacting her ability to perform her activities of daily living.

23. I find the applicant's injuries fall within the injuries listed in the IVA and *Minor Injury Regulation*. Although she argues she has nerve issues, she underwent neurologic testing with a neurologist, Dr. Namratha Sudharshan, in June 2022. In his June 29, 2022 report, Dr. Sudharshan advised the applicant's alleged "nerve pain" was likely myofascial, and that all the applicant's nerve conduction studies were normal. So, I find the applicant's complaints of ongoing pain are the result of various sprains and strains or a WAD-type injury, consistent with the diagnoses given throughout her medical records.

24. The respondent provided clinical records from the applicant's family doctor, Dr. Magda Du Plessis, her chiropractors, and massage therapist, kinesiologist, acupuncturist, and physiotherapists.

25. Based on the records in evidence and the applicant's submissions, I accept that the applicant's accident injuries have not resolved, more than 2 and a half years post-accident. However, in order to successfully show her injuries are not "minor injuries", the applicant must also prove that her injuries have resulted in a substantial inability to perform her regular work duties or her activities of daily living.

26. The difficulty for the applicant is that the medical evidence does not support her claim that her injury is not minor. The evidence is that she is working full time, full duties, with no known accommodations for her injuries. So, I find she is substantially able to perform her regular employment.

27. Similarly, although the applicant argues she is unable to do everyday tasks such as doing her hair or limiting the amount of time she plays with her son, I find the medical evidence shows the applicant has resumed all her prior activities of daily living (ADLs).

28. For example, a September 18, 2020 clinical note from one of the applicant's physiotherapists, Jordana Moxon, noted the applicant had returned to her ADLs, but modified at home as necessary. In a July 13, 2021 clinical note, nearly 1 year after the accident, another of the applicant's physiotherapists, Erica Best, noted the applicant was "able to function with work and ADLs".

29. Section 1 of the IVA (as in place at the time of the accident) defines "activities of daily living" as including the following activities:

    a. Preparing personal meals,

    b. Managing personal finances,

    c. Shopping for personal needs,

    d. Using public or personal transportation,

    e. Performing housework to maintain a place of residence in acceptable sanitary condition,

f. Performing personal hygiene and self-care, and

g. Managing personal medication.

30. Apart from the applicant stating she is unable to do her hair as she likes or hold her son for longer periods, I find there is simply no evidence that she is substantially unable to perform her activities of daily living as they are defined in the IVA. So, based on the evidence before me, I find the applicant's injuries are "minor injuries" as defined by section 101 of the IVA and the *Minor Injury Regulation*.

Damages

31. As noted, in dispute VI-2021-007492, the applicant claims $40,000 for non-pecuniary damages and $10,000 for special damages. As I have found the applicant's injuries were minor, section 103(1) of the IVA and section 6 of the *Minor Injury Regulation* say any non-pecuniary damages are limited. For accidents between April 1, 2020 and April 30, 2021, which includes this accident, the applicable limit is $5,627. So, I find the applicant's claim for non-pecuniary damages is limited to that "minor injury cap".

32. The respondent agrees the applicant is entitled to $5,627 as non-pecuniary damages, so I award her that amount.

33. As for the applicant's claim for special damages, I find she has not provided any evidence or substantive submissions for this claim. Although the applicant says she had to pay out of pocket for some of her treatment sessions, she did not provide any evidence of what treatments or when, the cost of those treatments, or how much she had to pay. So, I dismiss this aspect of the applicant's claim for damages as unproven.

34. Additionally, the applicant argues ICBC has limited her treatment sessions for physiotherapy, acupuncture, and chiropractic. However, ICBC is not a party to either of these disputes. Nothing in this decision prevents the applicant from starting an accident benefits claim against ICBC for the requested treatment, should ICBC refuse to fund it.

Deductions

35. On February 19, 2021, on the respondent's behalf, ICBC paid the applicant $5,627 towards her damages claim. The respondent asks that this amount be deducted from the applicant's award for non-pecuniary damages on the basis it was a pre-litigation payment under Part 9 of the IVA.

36. The applicant does not dispute receiving the $5,627, and her submissions on deductions were irrelevant to this specific payment.

37. Part 9, Section 108 of the IVA allows ICBC to offer pre-litigation payments, but it says the offer must be made in writing and contain a statement that the offer is made under Part 9 of the IVA. The correspondence in evidence shows that ICBC sent the applicant the cheque, and later advised that the payment would be deducted from any higher award made through a lawsuit, and if the applicant was awarded less, that no repayment was required. However, ICBC made no reference in the submitted correspondence that the offer was made under Part 9 of the IVA. On the evidence before me, it is not clear that ICBC complied with section 108.

38. However, the fundamental principle of damages awards is that an applicant should be compensated for the full amount of their loss, but not more. Courts have held that there is a rule against "double recovery" as it breaches this principle. This is because double recovery would place an applicant in a better position than if the tort or breach of contract had not occurred (see: *Ashcroft v. Dhaliwal*, 2008 BCCA 352, leave to appeal ref'd [2008] SCCA No. 488 at paragraph 2 and *Henry v. British Columbia (Attorney General)*, 2017 BCCA 420, leave to appeal ref'd [2018] SCCA No. 53 at paragraphs 29 to 30).

39. As noted, I have found the applicant's injuries are minor injuries and are therefore subject to the $5,627 minor injury "cap". ICBC says the $5,627 payment was for general damages, and the applicant does not argue the payment was for anything other than her personal injury damages. I find that although ICBC did not clearly comply with section 108(3)(b) of the IVA when it provided the payment, if the payment

was not deducted from the applicant's damages award, it would result in double recovery. So, I find I must deduct the payment.

40. Therefore, I find the applicant has already been paid $5,627, which is the highest amount she could be awarded for non-pecuniary damages in the circumstances. So, I find the applicant is not entitled to further compensation for pain and suffering. I dismiss her claim.

SUMMARY

41. In summary, I find the applicant's injuries are "minor injuries" as defined by section 101 of the IVA.

42. Given the applicant has already been paid $5,627 for non-pecuniary damages, I dismiss her claim for further non-pecuniary damages. I also dismiss the applicant's claim for special damages.

FEES, EXPENSES AND INTEREST

43. 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. As the applicant was ultimately unsuccessful, I dismiss her claim for reimbursement of tribunal fees. As the respondent was successful, I find the applicant must reimburse the $25 it paid in tribunal fees. Neither party claimed dispute-related expenses.

ORDERS

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

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

46. I dismiss the applicant's claims in dispute VI-2021-007492.

47. 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