Citation: Campbell v. Definity Insurance Company, 2025 ONLAT 25-003065/AABS-PI

Licence Appeal Tribunal File Number: 25-003065/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:

Barbara Campbell

Applicant

and

Definity Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Lisa Holland**

APPEARANCES:

For the Applicant: Michael Switzer, Counsel

For the Respondent: Angelo Sciacca, Counsel

Heard: **By Way of Written Submissions**

OVERVIEW

[1] Barbara Campbell (the "applicant") was involved in an automobile accident on August 17, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by Definity Insurance Company (the "respondent") and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

[2] The preliminary issue to be decided is:

i. Is the applicant barred from proceeding to a hearing by the doctrine of *res judicata*?

RESULT

[3] The Tribunal determined that the applicant did not sustain a catastrophic impairment under criterion 8 in the previous decision dated September 10, 2024, and she is barred from proceeding with her application before the Tribunal because the doctrine of *res judicata* applies.

ANALYSIS

Background

[4] The applicant was involved in an accident on August 17, 2018, and filed an application with the Tribunal (File no. 21-002763/AABS). In a decision dated September 10, 2024 (the "2024 decision"), the Tribunal determined that the applicant had not sustained a catastrophic impairment under criterion 8. The applicant did not file a request for reconsideration of the decision or file an appeal.

[5] The applicant subsequently submitted a further Determination of Catastrophic Impairment form ("OCF-19") dated November 21, 2024, completed by Dr. Lisa Becker, to make a second application for catastrophic impairment under criterion 8. When the respondent did not accept the applicant had sustained a catastrophic impairment, the applicant again applied to the Tribunal for resolution in the present case. This second application again seeks a determination that the applicant sustained a catastrophic impairment under criterion 8, which was the same issue that was decided in the 2024 decision.

[6] At the case conference held on June 5, 2025, the respondent raised the preliminary issue that the doctrine of *res judicata* applies to the current application regarding the issue of whether the applicant's injuries are catastrophic pursuant to criterion 8.

Preliminary Issue: Res Judicata and Tribunal File 21-002763/AABS

[7] I find that that the doctrine of *res judicata* applies.

[8] The respondent submits the doctrine of *res judicata* applies to this application, as the Tribunal previously determined that the applicant did not sustain a catastrophic impairment under criterion 8.

[9] The applicant submits that although the Tribunal has already decided whether she has a catastrophic impairment, and *res judicata* does apply to her claim, there is fresh, new evidence which the Tribunal did not previously consider as an exception to *res judicata*. The applicant submits that the fresh, new evidence was previously unavailable and will conclusively impeach the results of the previous decision.

[10] The doctrine of *res judicata* prevents a party from relitigating an issue that has already been decided. Three preconditions must be established before the adjudicator can determine whether to exercise discretion to apply the doctrine of *res judicata,* or more specifically *issue estoppel,* as set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 at para.25:*

i. that the same question has been decided;

ii. that the judicial decision which is said to create the estoppel was final; and,

iii. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[11] I am satisfied that these preconditions have been met and that the doctrine of *res judicata* applies to this application. The prior decision was made on the merits and found that the applicant sustained non-catastrophic injuries. Further, the 2024 decision was a final decision. I find that the parties are the same as in the previous application.

[12] While the applicant argues that there is fresh evidence, (which I will address below), I find that it was not fresh evidence that would impeach the prior finding.

The parties agree that *res judicata* applies and therefore there is no dispute for me to resolve regarding the application of *res judicata.* However, the applicant further argues that if *res judicata* applies, it should be waived in this instance. I will now turn to consider this argument.

Waiver of Res Judicata and new evidence

[13] I find that the applicant has not established that *res judicata* should be waived in this case.

[14] The applicant argues that if *res judicata* does apply, it should be waived, since fresh, new, previously unavailable evidence, conclusively impeaches the original result, and also since fairness dictates that the original result should not be binding in the new context.

[15] As set out in *Toronto (City) v. CUPE Local 79*, 2003 SCC 63 at para. 52, *res judicata* can be waived in the following situations:

a) The first proceeding is tainted by fraud or dishonesty;

b) Fresh, new, evidence is submitted that was previously unavailable that would conclusively impeach the original results; or

c) When fairness dictates that the original result should not be binding in the new context.

[16] The applicant does not argue the first proceeding was tainted by fraud or dishonesty.

There is no fresh, new evidence

[17] I find that there is no fresh, new evidence in this case that would impeach the original findings.

[18] The applicant submits that there are four new reports that contain medical evidence which was previously unavailable at the previous hearing, which include: a neuropsychological assessment report dated October 16, 2023, by Dr. Ken Reesor, of Reesor and Associates (“2023 Reesor report”); a neuropsychological re-assessment report dated September 25, 2024, by Dr. Reesor (“2024 Reesor report”); a multidisciplinary catastrophic impairment report dated November 21, 2024, by Omega Medical Associates (2024 Omega report”); and a catastrophic medical opinion addendum report dated June 11, 2025, by Dr. Lisa Becker, of Omega Medical Associates (“2025 Omega addendum”). The applicant further submits these reports constitute new evidence, that would

impeach the original results in distinguishing between her pre- and post-accident psychological condition and the issue of causation. The applicant argues that the new reports were received after the deadline to file submissions in the previous hearing and contain updated assessments and testing of the applicant's psychological condition.

[19] The applicant submits that the 2023 Reesor report describes a deterioration in her psychological condition after the accident, and the report was not received until after the deadline for submissions in the previous hearing. However, the report is based on assessments that pre-date the original hearing. Therefore, the 2023 Reesor report does not provide information that was previously unavailable regarding the applicant's pre-and post-accident psychological impairments, and it would not impeach the original outcome.

[20] The applicant submits that the 2023 Reesor report, the 2024 Reesor report and the 2024 Omega report address the issue of causation with more extensive and specific findings. The applicant submits that these reports provide updated assessments and testing which would impeach the original results. The applicant submits that the 2023 Reesor report indicates that the applicant was vulnerable to developing complications after the accident and her pre-existing conditions do not account for her post-accident impairments. The applicant further submits that the 2024 Reesor report indicates there was a substantial worsening of the applicant's functioning after the accident, despite the lack of any references to her pre-accident level of functioning. Further, the applicant submits that the 2024 Reesor report and the 2024 Omega report conclude that the applicant was a thin skull and vulnerable to relapses in her psychological impairment and level of functioning.

[21] The applicant submits that the new reports address the findings in the 2024 decision regarding a substantial deterioration of her psychological condition after the accident and the issue of causation. The applicant submits that the 2023 Reesor report and the 2025 Omega Addendum report identified new and more severe diagnoses, including posttraumatic stress disorder and major depressive disorder, and specified anxiety disorder. However, I find that the 2023 Reesor report is based on information that was available at the time of the previous hearing. The applicant further submits that the 2024 Omega report includes an opinion by Dr. Ajmal Razmy, psychiatrist, with diagnoses of post-traumatic stress disorder, persistent pain, major depressive disorder and generalized anxiety disorder. The applicant argues that the opinions in the new reports contain new evidence that will impeach the original results.

[22] The respondent submits that the applicant has not produced new evidence that was unavailable at the time of the previous decision which would conclusively impeach the original results. The respondent further submits that the new reports are not conclusive because they are based on unreliable self-reporting of the applicant rather than the medical evidence.

[23] The respondent further submits that the applicant seeks to re-litigate the same issue that was already decided in the previous decision by filing new reports that comment on the 2024 decision and attempt to bolster her position.

[24] I am not satisfied that the new reports are sufficient to represent new evidence that was previously unavailable and would conclusively impeach the original results to waive *res judicata*. I find that the opinions in the 2023 Reesor report and the 2024 Reesor report are based on the fact that the applicant was functionally independent with no restrictions or difficulties before the accident. In addition, Dr. Reesor concludes in the 2023 Reesor report and 2024 Reesor report that the applicant's assessment and testing results are consistent with his earlier report in 2019 ("2019 Reesor report"). Further, Dr. Reesor already provided an opinion on whether there was a material and substantial change in the applicant's functionality after the accident, which was considered in the 2024 decision.

[25] As stated in the 2024 decision, Dr. Reesor's opines in the 2019 Reesor report that the applicant was stable before the accident and she was receiving appropriate medical oversight and management. However, the Tribunal found that this opinion conflicts with the applicant's pre-accident medical evidence, which includes chronic and severe disability from orthostatic tremors with restrictions in her ability to walk, feed and dress herself. The applicant's past medical history also includes marked restrictions from mental functions necessary for everyday life, including days spent in bed and fear of leaving the house. Similarly, in the 2024 Reesor report, the applicant's pre-existing conditions are found to be insufficient to account for her symptoms and impairments. I find that the Tribunal has already considered the applicant's extensive medical history in the 2024 decision and made a determination that the applicant's symptoms and impairments pre-date the accident.

[26] I am also not satisfied that the new reports provide evidence of a new and more severe diagnosis that was previously unavailable and would conclusively impeach the original results. I find that the 2023 Reesor report is based on assessments of the applicant that were available at the time of the previous hearing. I find that the 2019 Reesor report also made a similar diagnosis of pre-existing bipolar/depressive disorder, anxiety, and other medical problems, in

addition to adjustment disorder, pain disorder and possible neurocognitive disorder due to multiple etiologies. However, the 2019 Reesor report was already considered in the previous decision, and the Tribunal found that the applicant's medical history includes the similar diagnoses of major depression with anxiety, severe, and cognitive difficulties.

[27] Further, I find that the 2024 Omega report includes the opinions of Dr. Giselle Braganza, psychologist and Dr. Ajmal Razmy, psychiatrist, which rely on the applicant's self-reporting that she had no cognitive problems before the accident, and she was psychiatrically stable and functioning well in most aspects of her life. However, I find these reports carry minimum weight because the Tribunal has already decided that the applicant reported inaccurate information to assessors regarding her pre-accident condition. These opinions also indicate that the applicant was vulnerable to stress and trauma and the accident was a substantial and material change to her psychological impairment and functioning. I note that Dr. Braganza agrees that the applicant's level of impairment before the accident is unknown.

[28] I find that the applicant's psychological symptoms were known to the applicant at the time of the previous decision. I find that these new reports have the same short comings that were already addressed in the 2024 decision, namely that the opinions are based on the applicant's self-reporting rather than her medical history. Therefore, this is not fresh, new evidence that was previously unavailable that would impeach the original result.

[29] Consequently, I find that there is not fresh evidence that could conclusively impeach the prior findings.

Fairness does not dictate that the original result should not be binding in the new context

[30] I find that the applicant has not satisfied me that fairness requires me to exercise my discretion to waive *res judicata*.

[31] The applicant submits that the applicant's claim for catastrophic impairment should be considered on the principles of fairness and in the interest of justice. However, the applicant has not argued that at the time of the original hearing she was restricted in her submissions or financially unable to obtain reports. The applicant submits that her current condition represents a significant deterioration caused by the accident. However, the applicant had the opportunity to make these arguments at the time of the original hearing. As such, the applicant has not satisfied me that fairness requires me to exercise my discretion to waive *res*

judicata, particularly since the new evidence does not raise additional information to determine whether the applicant meets the test for catastrophic impairment.

[32] The respondent argues that it would be an abuse of process to allow the applicant to re-litigate the same issue which was already decided in the previous decision. However, there are exceptions to *res judicata*, and although the applicant did not satisfy me that an exception applies here, it was an argument she could make under these circumstances.

[33] I find that despite any further deterioration in the applicant's current psychological condition or into the future, the question of causation does not change. I find that the 2024 decision has already decided the issue of causation, which includes the applicant's vulnerability to relapse and exacerbation of her pre-existing psychological condition. The 2024 decision turned on causation. The new reports contain the same problems as the reports considered in the 2024 decision in not reflecting the applicant's pre-existing conditions and are solely being based on self-reporting. Therefore, the new reports can not impeach the 2024 decision.

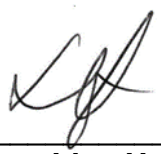
[34] Therefore, there is no basis to waive the application of *res judicata* in these circumstances, and the application is dismissed.

ORDER

[35] I find that the applicant is barred from proceeding with her application pursuant to the doctrine of *res judicata*.

[36] The application is dismissed and the substantive hearing is vacated.

Released: September 3, 2025



Lisa Holland
Adjudicator