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

Tribunal File Number: 18-003051/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:

A.I.

Applicant

and

RBC General Insurance Company

Respondent

DECISION

PANEL: **Stephanie Kepman**

APPEARANCES:

For the Applicant: Ivy So, Paralegal
Lisa Thach, Counsel

For the Respondent: Maia Abbas, Counsel

HEARD: In-Person: **November 1, 2018**

OVERVIEW

[1] A.I. ("the applicant") was injured in an automobile accident on February 8, 2016 ("the accident") and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(the "Schedule").* She applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") when her claims for medical and income replacement benefits were denied by the respondent.

[2] The respondent denied the applicant's medical claims because it determined that all of the applicant's injuries fit the definition of "minor injury" prescribed by s. 3(1) of the *Schedule* and, therefore, fall within the Minor Injury Guideline[2] ("the MIG"). The respondent also denied that the applicant sustained a "substantial inability", prescribed by s. 5(1)(i) of the *Schedule* and that the applicant is entitled to an income replacement benefit ("IRB"). The respondent also disputes the quantum or the monthly benefit amount of the IRB claimed by the applicant.

[3] If it is determined that the applicant's positions fall within the MIG, there is no need to conduct an analysis of the reasonableness and necessity of the treatment plans in dispute.

ISSUES

[4] The issues in dispute were identified and agreed to as follows:

(i) Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?

(ii) Is the applicant entitled to a medical and rehabilitation benefit in the amount of $2,496.80 for physiotherapy treatment recommended by York Wellness Centre Inc. in a treatment plan (OCF-18) submitted on July 21, 2016, and denied on August 4, 2016?

(iii) Is the applicant entitled to a medical and rehabilitation benefit in the amount of $2,007.40 for physiotherapy treatment recommended by York Wellness Centre Inc. in a treatment plan (OCF-18) submitted on November 26, 2016, and denied on December 9, 2016?

[1] O. Reg. 34/10.
[2] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

(iv) Is the applicant entitled to payments for the cost of examinations in the amount of $2,198.77 for a Psychological Assessment, recommended by York Wellness Centre Inc. in a treatment plan dated July 4, 2016 and denied by the respondent on July 14, 2016?

(v) Is the applicant entitled to receive an income replacement benefit in the amount of $63.49 per week for the period February 15, 2016 to date and ongoing? What is the amount of weekly income replacement benefit that the applicant is entitled to receive?

(vi) Is the applicant entitled to interest on any overdue payments of benefits?

RESULT

[5] I find that the applicant suffered physical injuries that are predominantly minor.

[6] As a result of the applicant's injuries being within the MIG and the MIG limits being exhausted, the applicant is not entitled to medical and rehabilitation benefit for either physiotherapy treatment plan, or the cost of examination for a psychological assessment.

[7] I also find the applicant is not entitled to an IRB.

HEARING

[8] A one day, in-person hearing was conducted where the applicant testified.

[9] I have considered all of the evidence led during the hearing and only summarized what I found relevant to my determination below.

ANALYSIS

The Minor Injury Guideline

[10] Section 3(1) of the *Schedule* defines a "minor injury" as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury and includes any clinically associated sequelae to such an injury." The MIG defines in detail what these terms for injuries mean.

[11] The onus is on the applicant to show that her injuries fall outside of the MIG.[3]

[3] *Scarlett v. Belair,* 2015 ONSC 3635 para.24

Did the applicant sustain predominantly minor physical injuries?

[12] I find the applicant's injuries are predominantly minor injuries that fall within the definition of the MIG for the following reasons:

a. The clinical notes and records (CNRs) of the applicant's General Practitioner at a local walk-in clinic, Dr. Aruna Lambotharan, note the applicant had complained of dizziness prior to the accident on December 2, 2015.

b. The same CNRs state that the applicant has dizziness and ringing in her ears from April 2017 to June 2017, when the records end. However, there is no diagnosis of the complaints and no indication as to whether they may be as a result of the accident.

c. A letter from Dr. Crotin, Otolaryngologist - Head and Neck Surgeon, dated November 21, 2017, which noted no remarkable findings in the applicant. The applicant was referred to Dr. Crotin by her Family Doctor, Dr. Wijeyakulasingam.

d. The applicant's physiotherapist, Jinesh Ninan, in completing the applicant's Disability Certificate (OCF-3) noted the following injuries: whiplash associated disorder (WADII), other sprains and strains of the cervical spine, sprain/strain of the shoulder joint, knee and lumbar spine, low back pain and headaches, all which are within the definition of the MIG. Tinnitus and dizziness are not mentioned.

[13] The applicant has not provided me with enough compelling evidence for me to be able to conclude that her tinnitus and vertigo were caused by the accident. As a consequence, I find that her injuries are minor in nature.

[14] The applicant submits that, should her injures be found to be within the MIG, she should still be considered outside of the MIG based on either/and/or her:

1. pre-existing medical condition

2. psychological injuries

3. chronic pain

Does the applicant have any pre-existing medical condition?

[15] I do not find the applicant to have a pre-existing condition that would remove her from the MIG for the following reasons:

[16] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the $3,500 cap on benefits. In order to be removed from the MIG, the applicant must provide compelling evidence meeting the following requirements:

i. There was a pre-existing medical condition that was documented by a health practitioner before the accident; and

ii. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the $3,500 on treatment costs under the MIG.[4]

[17] A pre-existing condition will not automatically exclude a person's impairment from the MIG; it must be shown to prevent maximal recovery within the cap imposed by the MIG.

[18] The applicant states that, prior to her accident, she suffered from anemia and fibroids. This is not disputed by the respondent. What the respondent disputes is that the applicant's pre-existing condition can be treated within the MIG financial limits.

[19] The applicant testified that she received a blood and iron transfusion as a result of her fibroids while living in Vancouver. However, those records were never provided to her family doctor, Dr. Wijeyakulasingam, and were not produced as evidence at the hearing. As a result, the conditions of section 18(2) have not been met.

[20] Though it is not denied that the applicant has pre-existing conditions, she has not advanced substantiated arguments that explain why or how her pre-existing conditions would prevent her recovery within the MIG.

[21] She has not satisfied the criteria of section 18 of the *Schedule,* namely that she provide evidence of a pre-existing condition that was document by a health practitioner, prior to her accident, which would prevent her from achieving maximal medical recovery if subjected to the MIG limits. As a result, I find the applicant's pre-existing conditions do not remove her from the MIG.

[4] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act* page 5, Part 4, "Impairments that do not come within this Guideline".

Does the applicant have a psychological impairment?

[22] Psychological impairments, if established, may fall outside the MIG, because the MIG only governs "minor injuries" and the prescribed definition does not include psychological impairments.

[23] I find that the applicant has not demonstrated that she suffers from a psychological injury that would remove her from the MIG for the following reasons:

a. The respondent's Insurer Examining assessors ("IEs") found no diagnosable DSM-5 diagnosis during both of its assessments. Dr. Ratti's evaluated the applicant on two separate occasions. During both evaluations, he found that the applicant did not suffer from a psychological impairment. Though the applicant did self-report some symptoms of mild anxiety, and chronic pain, these results did not appears in any of Dr. Ratti's testing, and was not found to be serious enough to warrant any diagnosis.

b. The applicant's CNRs from her Family Doctor, Dr. Wijeyakulasingam, indicate that the applicant did tell her doctor she was dealing with anxiety once. However, after that date, there is no mention of psychological complaints for the period of November 26, 2016 to January 09, 2017.

[24] When the doctor followed up with the applicant about her mental status, the applicant told her doctor she was doing "good". I have no documents indicating that the applicant wanted to address her mental health on an on-going basis. When Dr. Wijeyakulasingam brought the issue up, the applicant did not report the need for treatment.

[25] The applicant was visiting her Family Doctor on a regular basis from fall 2016 to winter 2017 for her health. She did not raise the issue of her mental health again.

[26] I am not satisfied that the applicant was suffering from a psychological impairment.

Does the applicant suffer from chronic pain?

[27] The applicant submits that she suffers from chronic pain, which removes her from the MIG, because the prescribed definition of "minor injury" does not include chronic pain conditions.

[28] The applicant argues that she suffers from chronic pain. She relies on her in-person testimony.

[29] The respondent argues that the applicant has not demonstrated any evidence that she suffers from chronic pain. It points the Tribunal *to M.N.M v. Aviva*[5], in which adjudicator Ferguson chose to use the American Medical Association (AMA) Guides when assessing chronic pain claims.

[30] During her testimony, the applicant stated that she is taking "tablets for pain", but that they make her sleepy. These pills were identified as Advil & Tylenol. The applicant also testified that she was relying on her care from her two daughters, one who is only 9 years old and one who is 21. The applicant stated that she relying on help from both of her daughters due to her injuries and pain. She also stated that she has been avoiding going for walks due to her pain and dizziness.

[31] The respondent argued that the onus of proving chronic pain was on the applicant and she had not done so. She had failed to provide medical evidence corroborating her claims of chronic pain, had not requested a chronic pain assessment, had not received any pain related diagnosis and had not met the AMA guidelines for chronic pain.

[32] Based on these submissions, and the testimony of the applicant, I sympathize with the applicant and what she is going through. However, her testimony alone is not sufficient to prove she suffers from chronic pain. Other compelling evidence such as medical documents or a diagnosis is required.

[33] I find that the applicant has not met her burden to demonstrate that she has chronic pain. She has not provided medical documents or a diagnosis that corroborates or demonstrates that she suffers from chronic pain; she has not provided any CNRs that make reference to chronic pain syndrome or that she may have chronic pain. The applicant has not satisfied her onus to establish that she has chronic pain that may remove her from the MIG.

[34] Because I have found the applicant's injuries to fall within the MIG, it is unnecessary for me to determine whether the claimed treatment plans are reasonable and necessary. I will now turn to discuss the IRB.

Is the applicant entitled to an Income Replacement Benefit? If so, what is the quantum of this benefit?

[5] 17-007825/AABS, July 30, 2018

Pre-104 week Income Replacement Benefit

[35] The applicant is also seeking an IRB in the amount of $63.49 per week for the period of February 15, 2016 to date and ongoing. The respondent denies this, stating that the applicant has not proven a substantial inability, and if it is determined she does have a substantial inability, then the quantum is denied.

[36] The applicant bears the burden of proving on a balance of probabilities she is entitled to a pre-104 week income replacement benefit.

[37] The test for entitlement to a pre-104 week income replacement benefit (IRB) is set out in section 5(1)(i) of the *Schedule*, which states the insurer shall pay an income replacement benefit if an insured person sustains an impairment as a result of the accident and "was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment". This is referred to as the "substantial inability" test.

[38] At the time of the accident, the applicant was 45-years-old and working as a cashier at Food Basics. The essential tasks of her employment included:

a) Standing

b) Operating the cash register

c) Bagging groceries

d) Scanning groceries

[39] The applicant testified at the hearing and presented herself as a very genuine and passionate witness. She explained that since her accident, she has been experiencing extreme pain in her body and that she has never dealt with these kinds of issues before.

[40] She testified that as a result of her pain, she was recently fired from her new job at Canadian Tire due to being "too slow" and testified that she had been told by her work supervisor on numerous occasions to "speed up". She stated that as a result of the accident, she's only able to work 1-2 days per week due to her chronic pain.

[41] There were credibility issues with the applicant's account of her substantial inability to complete the essential tasks of her employment after the accident. The respondent raised the issue that the applicant had been working anywhere

from 4-10 hours per week prior to the accident for the period of November 26, 2015 until the accident. The respondent also presented evidence of the applicant working as a cashier after her accident. In the video, she was seen completing the essential tasks of her employment at the time of her accident, including:

a) Standing

b) Operating the cash register

c) Bagging groceries

d) Scanning groceries

[42] Based on the paystubs provided by the applicant, the applicant returned to work during the week of March 10, 2016, just over a month after her accident. The applicant provided paystubs until the date of August 24, 2017. These records show the applicant working anywhere from 4 to 9.5 hours on a regular, consistent basis, similar to her pre-accident working hours.

[43] The applicant stated that she had to work in order to provide for her and her daughter. But she felt the fact that she was working did not "disprove" that she was in pain, but rather, that she cared so much for her daughter that she worked despite it.

[44] The respondent concluded that the applicant has not demonstrated that she suffered a substantial inability.

[45] When analysing the applicant's testimony and the documents put before me, I do believe that the applicant is suffering from pain. However, she has not shown that this pain has resulted in a substantial inability for her to perform the essential tasks of her employment.

[46] Based on the paystubs she provided, she has worked just as many hours after her accident as before. She has not provided the necessary evidence to substantiate her claim that she is suffering from substantial inability. Since the applicant has not met her onus to claim an income replacement benefit, a quantum of entitlement does not have to be determined.

CONCLUSION

[47] For the reasons outlined above, I find that:

i. The applicant sustained predominantly minor injuries that fall within the MIG. Accordingly, she is not entitled to the treatment plans claimed in this application.

ii. The applicant is not entitled to an income replacement benefit.

iii. The applicant is not entitled to interest.

Released: June 18, 2019

Stephanie Kepman
Adjudicator