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

Citation: C.N. v. Aviva General Insurance, 2020 ONLAT 19-004405/AABS

Released Date: 09/23/2020
File Number: 19-004405/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:

Clifford Noel

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

PANEL: **Theresa McGee, Vice-Chair**

APPEARANCES:

For the Applicant: Clifford Noel, Applicant
Lawrence A. Berg, Counsel

For the Respondent: Arijana B. Schrauwen, Counsel

HEARD: In Writing **August 24, 2020**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant ("C.N."), a 69 year old male retiree, while traveling in his vehicle at approximately 30-40 kilometres per hour on May 18, 2017, t-boned another vehicle that failed to obey a stop sign.

[2] C.N. sought certain benefits from the respondent ("Aviva") pursuant to the *Statutory Accident Benefits Schedule — Effective September 1, 2010*. O. Reg. 34/10 ("*Schedule*"). When those benefits were denied, he applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for a resolution of the dispute.

[3] C.N. seeks a determination that he is entitled to receive a non-earner benefit. Aviva disputes C.N.'s entitlement to a non-earner benefit and seeks an order for costs in the amount of $500.00 for the preparation of its sur-reply.

ISSUES TO BE DECIDED

[4] The parties agree that the following issues remain in dispute:[1]

i. Is the applicant entitled to receive a non-earner benefit in the amount of $185.00 per week for the period of May 18, 2017 to date and ongoing?

ii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[5] I find that C.N. is not entitled to receive a non-earner benefit. He has failed to demonstrate, on a balance of probabilities, that he meets the criteria for entitlement. As no benefits are payable, C.N. is not entitled to receive interest. Conversely, Aviva's request for costs is dismissed.

[1] As listed in the Case Conference Order of Adjudicator A. Msosa dated November 4, 2019.

[6] At paragraph 14 of his written submissions, C.N. states that he seeks a determination that he is entitled to a non-earner benefit from May 19, 2019 to date and ongoing.[2] I note that the determination sought varies from the issues in dispute as defined in the Case Conference Order of Adjudicator A. Msosa above. Elsewhere in C.N.'s submissions he seeks benefits from as early as May 13, 2019.

[7] In discussing the end of the period of entitlement, C.N. refers in his submissions to September 10, 2019, the date the s.44 Insurer's Examiners issued their concurrent reports. However, he then states that he is entitled to benefits at least until September 20, 2019.

[8] I believe C.N. to be claiming benefits for at least the 18 weeks from the date the disability certificate was filed (May 13, 2019) to the date of the s. 44 Insurer's Examiners' reports (September 10, 2019).

[9] Because I determine that C.N. is not entitled to the benefit in dispute, it is not necessary for me to reconcile the inconsistencies in the order requested by C.N.

ANALYSIS

[10] Section 12(1) of the *Schedule* sets out the eligibility criteria for a non-earner benefit:

> The insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person […] *suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident* and does not qualify for an income replacement benefit.
>
> [Emphasis added.]

[2] Applicant's Submissions at para. 14.

[11] Section 1(7)(a) of the *Schedule* provides that a person suffers "a complete inability to carry on a normal life as a result of the accident" if:

> as a result of the accident, the person sustains an impairment that *continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident*. [Emphasis added.]

[12] The Ontario Court of Appeal held in *Heath v. Economical Mutual Insurance Company* that an analysis of whether a person suffers a complete inability to carry on a normal life begins with comparing the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident.[3]

Is the applicant entitled to a non-earner benefit?

[13] C.N. submits that the accident exacerbated a previously asymptomatic pre-existing right shoulder injury. He submits that, as a result of the accident, he suffers pain and discomfort in his neck, right shoulder, and lumbar spine which has "adversely affected" his activities of daily living. However, he makes no submissions on what those activities were - before or after the accident. He has made no submissions about how this impairment has impacted his activities and life circumstances, or adduced evidence of an impairment that prevents him from engaging in substantially all of his pre-accident activities.

[14] I cannot accept C.N.'s submission that immediately prior to the accident his injury was generally asymptomatic. There is clear evidence that C.N. had a pre-exisitng shoulder injury that was causing him pain. As Aviva points out, about a month before the accident, on April 7, 2017, C.N. visited his family physician, Dr. Abdul Salam, reporting pain and tenderness in his right shoulder. Dr. Salam

[3] 2009 ONCA 391 at para. 50.

ordered an ultrasound of C.N's shoulder. Conducted on April 11, 2017, the ultrasound found severe cortical irregularity, tears and bony irregularities.

[15] Following the accident, C.N. visited Dr. Salam on two occasions: on October 11, 2017, and on March 19, 2018. There is no mention of the accident in the clinical notes and records from October 11, 2017.

[16] At the March 19, 2018 visit – a year after the accident – C.N. reported right shoulder pain "for a while", that he had surgery in the past, and he "felt more pain" in his right shoulder after the accident. In his notes from the March 19, 2018 visit, Dr. Salam also notes that C.N. had seen a lawyer who told him to see his family doctor for testing.

[17] Dr. Salam referred C.N. for an MRI, which was conducted on April 27, 2018, showing rotator cuff tendinopathy and osteoarthiritic changes but no evidence of tearing. Aviva submits that the results of the MRI are consistent with C.N.'s pre-accident complaints.

[18] The medical evidence before me is insufficient to establish a worsening of C.N.'s right shoulder injury as a result of the accident. Additionally, even if I were to accept that C.N.'s shoulder injury was exacerbated by the accident, I accept Aviva's submission that subjective pain, in and of itself, does not satisfy the criteria for entitlement to a non-earner benefit. As this Tribunal has noted:

> ongoing pain as a result of an accident is not sufficient to meet the non-earner test. Non-earner benefits are not intended to compensate an insured person for having to engage in post-accident activity with pain and discomfort.[4]

[4] *17-003608 v Aviva Insurance Canada*, 2018 CanLII 13164 at para. 37.

[19] Instead, as Aviva correctly submits, C.N. must demonstrate that the pain and discomfort he suffers are: (a) as a result of the accident and (b) that they impair him by continuously preventing him from engaging in substantially all of his ordinary pre-accident activities. He has not done so. The only other medical evidence C.N. has provided is a March 25, 2020 MRI report filed with his reply submissions. This MRI, conducted nearly three years after the accident, is of little evidentiary weight and its findings are consistent with C.N.'s prior diagnoses.

[20] In reply to Aviva's submissions, C.N. submits that he continues to attend CBI Health Group for treatment, remains in significant pain, and continues to take medication. However, the only records in evidence from CBI are those Aviva has filed, ending in February 2018. C.N.'s prescription history is not in evidence.

[21] C.N. intended to rely on a report from Dr. Jason Su, a chronic pain specialist, which he submits he could not obtain due to a COVID-19 related clinic closure. I accept that updated records from Dr. Su could not be obtained. However, a previous report, authored by Dr. Su in June 2017 and referred to by Aviva in its initial submissions, was not filed as evidence.

[22] Clinical notes and records of C.N.'s family physician, Dr. Salam, are only in evidence because Aviva filed them; C.N. makes no mention of Dr. Salam's opinions in support of his position.

[23] C.N. submits that Aviva's decision, made four months prior to the hearing, to remove him from the Minor Injury Guideline speaks for itself. I disagree. That decision applies to a different legal test, and does not establish eligibility for a non-earner benefit. C.N. has fallen short of his evidentiary burden.

[24] Aviva relies on the evidence of its assessors, Dr. Michael Ko, Physical Medicine and Pain Specialist, and Mr. Rod Pritchett, Occupational Therapist, whose concurrent reports are dated September 20, 2019. Dr. Ko found that, while C.N.

is unable to do heavy lifting with his right hand and shoulder due to pain, he remains independent in showering, dressing, toileting, eating and grooming.[5]

[25] Mr. Pritchett found that at the time of the in-home assessment, C.N. "presented with sufficient functional ability to manage participation in many aspects of his preaccident daily activities."[6] C.N. reported being able to engage in all of his pre-accident activities independently except vacuuming, mopping, bathroom cleaning, heavy grocery shopping, heavy garbage removal, grass cutting and snow removal. He continued to drive a vehicle, though not for long distances. He continued to participate in all his pre-accident leisure activities except bodybuilding.

[26] Aviva notes that records from CBI Health Group, where C.N. attended for physiotherapy and chirpractic services, demonstrate near complete rehabilitation from the injuries C.N. may have sustained in the accident. Following treatment, C.N. reported to treatment providers that he:

- was "feeling good" (June 16, 2017);[7]
- "felt great. Not sore" (July 4, 2017);[8]
- "feels good, right shoulder range of motion actually better than pre-MVA" (July 5, 2017);[9]
- "feels the best he has felt in a llong time and very content with treatment today" (August 22, 2017);[10]

[5] Hearing Submissions of the Respondent ("Respondent's Submissions") Tab C, Insurer Examination Section 44 Reports of Dr. Michael Ko and Mr. Rodney Pritchett, dated September 20, 2019.
[6] Respondent Submissions, Tab C, Insurer Examination Section 44 Reports of Dr. Michael Ko and Mr. Rodney Pritchett, dated September 20, 2019, page 44.
[7] Respondent's Submissions, Tab I, CBI Group clinical note and record dated June 16, 2017.
[8] Respondent's Submissions, Tab J, CBI Group clinical note and record dated July 4, 2017.
[9] Respondent's Submissions, Tab K, CBI Group clinical note and record dated July 5, 2017.
[10] Respondent's Submissions, Tab L, CBI Group clinical note and record dated August 22, 2017.

- "feels great and very content" (August 29, 2017);[11]
- "feels this was a great treatment" (February 22, 2018).[12]

[27] In a discharge report dated Febraury 6, 2018, Dr. Anita Bongers, Chiropactor, commented that C.N. had "returned to all pre-accident ADLs [activities of daily living] and social activities." She further notes, "He did have a pre-exisiting impairment of the right/left shoulder at the time of the accident and it appears he has reached his pre-accident level of function for this area."[13]

[28] Taken together, C.N.'s own self-reporting and the clinical notes of his health care practitioners at CBI Group suggest that he suffers a minimal level of impairment relative to his pre-accident level of functioning. I find consistency between the records of CBI and the findings of the In-Home Assessment conducted by Mr. Pritchett.

[29] For these reasons, I conclude that C.N. has failed to establish, on a balance of probabilities, that he meets the criteria for a non-earner benefit.

[30] Even if C.N. had established entitlement to non-earner benefits, Aviva submits, he would be precluded from receiving those benefits for all but five days because he failed to submit a disability certificate (OCF-3) claiming entitlement for non-earner benefits until May 13, 2019 - five days prior to the 104 weeks post-accident mark.

[31] C.N. submits that he is entitled to receive a non-earner benefit from May 13, 2019 to date and ongoing, or at least from the date he filed the disability certificate up to and including September 20, 2019.

[32] The *Schedule* and case law support Aviva's position. Under the *Schedule*, an insurer is not required to pay a non-earner benefit for more than 104 weeks after

[11] Respondent's Submissions, Tab M, CBI Group clinical note and record dated August 29, 2017.
[12] Respondent's Submissions, Tab N, CBI Group clinical note and record dated February 22, 2018.
[13] Respondent's Submissions, Tab O, CBI Group discharge report dated February 16, 2018.

the accident: s. 12(3)(c). Section 36(3) of the *Schedule* states that "[a]n applicant who fails to submit a completed disability certificate is not entitled to a specified benefit for any period before the completed disability certificate is submitted." C.N. had 104 weeks from the accident to submit, prove, and collect non-earner benefits.[14]

[33] Aviva also submits that C.N.'s reply was improper and should be given no weight. Whether or not his reply was improper, I have given C.N.'s reply submissions little weight because they are largely unpersuasive. They do not add to the analysis of whether he suffers a complete inability to carry on a normal life as a result of the accident.

COSTS

[34] Aviva is seeking an order for $500.00 in costs for the preparation of its sur-reply submissions. Aviva argues that C.N. intentionally failed to address the issue of the MRI report in his brief initial submissions in order to provoke an improper reply.

[35] While Rule 19 of the Tribunal's Common Rules of Practice and Procedure allows for costs where a party has acted unreasonably, frivolously, vexatiously, or in bad faith, I am not persuaded that the manner of C.N.'s reply demonstrates conduct warranting costs.

[14] *AH v. Certas Ins. Co., 17-002910/AABS* at para. 11; *16-001611 v RBC General Insurance Company,* 2017 CanLII 85689 (ON LAT) at para. 116.

ORDER

[36] The application is dismissed without costs.

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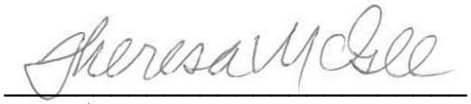

Theresa McGee, Vice-Chair