Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Mahendran v. Aviva General Insurance, 2021 ONLAT 20-001529/AABS

Released Date: 09/17/2021
File Number: 20-001529/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:

Sivapriya Mahendran

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam**

APPEARANCES:

For the Applicant: Hufriz Turel, Paralegal

For the Respondent: Evan Argentino, Counsel

HEARD: **By Way of Written Submissions**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] Sivapriya Mahendran ("applicant") was involved in an automobile accident on October 6, 2017 ("accident"), and sought benefits pursuant to the *Statutory Accident Benefits Schedule[1] - Effective September 1, 2010* ("*Schedule*").

[2] Aviva General Insurance ("respondent") determined the applicant's injuries are within the definition of "minor injury" prescribed by s. 3(1) of the *Schedule* and therefore fall within the Minor Injury Guideline ("MIG")[2]. The respondent also denied benefits including non-earner benefits ("NEB").

[3] The applicant disagreed with the respondent's decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal").

[4] The Tribunal's June 22, 2020 Order required that the preliminary issue below be heard with the substantive issues.

PRELIMINARY ISSUE

[5] The preliminary issue to be decided is:

i. Is the applicant's claim for NEB barred because she did not dispute the denial of that benefit within the two year time limitation?

SUBSTANTIVE ISSUES

[6] The substantive issues in dispute are:

i. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit in the MIG?

ii. Is the applicant entitled to NEB of $185.00 per week from November 5, 2017 to October 6, 2019, denied October 30, 2017?

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[1] O.Reg. 34/10

[2] Minor Injury Guideline, Superintendent's Guideline 01/14, issued under s. 268.3 (1.1) of the Insurance Act.

iii. Is the applicant entitled to $340.00 ($1,395 less $1,055.00 approved) for physiotherapy services recommended by Scarborough Physio & Rehab Clinic in a treatment plan (OCF-18) dated January 25, 2018?

iv. Is the applicant entitled to $1,965.00 for physiotherapy services recommended by Scarborough Physio & Rehab Clinic in a treatment plan (OCF-18) dated July 4, 2018?

v. Is the applicant entitled to $2,965.00 for physiotherapy services recommended by Scarborough Physio & Rehab Clinic in a treatment plan (OCF-18) dated February 8, 2019?

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

RESULT

[7] The applicant is barred from proceeding with her application for NEB. The applicant sustained minor injuries as defined under the *Schedule* and is subject to the $3,500.00 funding limit, which has already been provided by the respondent. It is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans. No interest is payable.

LAW

NEB

[8] Section 12 of the *Schedule* requires an insurer to pay a non-earner benefit to an insured person who does not qualify for an income replacement benefit and who suffers from “a complete inability to carry on a normal life” as a result of an impairment sustained in an accident. The impairment must arise within 104 weeks after the accident.

TIME LIMIT TO DISPUTE INSURER’S REFUSAL OF BENEFIT

[9] Section 56 of the *Schedule* provides that an application before the Tribunal in respect of a benefit shall be commenced within two years after the insurer’s refusal to pay the amount claimed. The onus is on the respondent to show that the limitation period has expired.

[10] Section 7 of the *Licence Appeal Tribunal Act, 1999*[3] (“*LAT Act*”) allows the Tribunal to extend a limitation period under certain circumstances. In

[3] S.O. 1999, c. 12, Sched. G.

considering whether to exercise its discretion to extend the limitation period the Tribunal must consider the following four factors[4]:

a. A bona fide intention to appeal within the limitation period;

b. The length of delay;

c. Prejudice to the other party; and

d. Merits of the appeal.

[11] The onus is on the applicant to establish reasonable grounds for an extension under s. 7 of *LAT Act*.

MIG

[12] The MIG establishes a treatment framework available to an injured person who sustains a “minor injury” as a result of an accident. A “minor injury” is defined in s. 3(1) of the *Schedule* 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”. Under s. 18(1) of the *Schedule*, injuries that are defined as a “minor injury” are subject to a $3,500.00 funding limit on treatment.

[13] To be eligible for treatment above the $3,500.00 funding limit, the applicant must establish that his or her impairments sustained in the accident are not predominantly minor, or produce compelling evidence, provided by a health practitioner, that was documented before the accident, that the applicant has a pre-existing condition that will prevent the applicant from achieving maximal recovery from the minor injury if subject to the funding limit.

[14] The onus is on the applicant to establish, on a balance of probabilities, that his or her injuries fall outside of the MIG[5].

MEDICAL AND REHABILITATION BENEFITS

[15] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident.

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[4] *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002*, 2012 ONSC 1492 (Div. Ct.)
[5] *Scarlett v. Belair*, 2015 ONSC 3635 (Div. Ct.) para 24.

[16] The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

Preliminary Issue: Respondent's position

[17] The respondent submits that the applicant is statute-barred from bringing a claim for NEB pursuant to s. 56 of the *Schedule* because it was commenced more than two years after the respondent's clear and unequivocal denial of the applicant's NEB claim on October 18 and 30, 2017 and she should be held to the limitation period.

Preliminary Issue: Applicant's position

[18] The applicant submits that her claim for NEB is not statute barred as the respondent failed to provide a clear and unequivocal denial sufficient to trigger the two year limitation period.

ANALYSIS

Preliminary Issue: Is the Applicant's Claim for NEB Barred Because She did not Dispute the Denial Within the Two Year Limitation Period?

[19] After considering all of the evidence, submissions and cases put forward by the parties, I find that the respondent has satisfied its onus to establish that the limitation period has expired regarding the applicant's claim for NEB.

[20] The respondent provided clear and unequivocal notice to the applicant that it determined she is not entitled to NEB in its letters dated October 18 and October 30, 2017. Both the October 18, 2017 letter and the October 30, 2017 letter advise the applicant that she is not eligible for NEB as she was employed at the time of the accident. Both letters are written in plain language and clearly communicate the denial of NEB, that the applicant has two years to dispute the decision and provided the applicant with a detailed explanation of the dispute resolution process available to her and were copied to the applicant's legal representative.

[21] The applicant's application to the Tribunal is dated January 31, 2020 and was filed with the Tribunal February 6, 2020, more than two years after the respondent's denial in October 2017. The limitation period to dispute the denial of NEB started October 18 or at the latest October 30, 2017 and ended October 30, 2019.

[22] The respondent never changed it's position from the denials in October, 2017 and it's communications following the denials on October 18 and 30, 2017 do not

re-set the running of the limitation period even though the respondent continued to adjust the applicant's claim in good faith as she submitted updated records and information. The denials were made by the respondent after receiving the applicant's completed OCF-1, application for accident benefits, as stated in the October 18, 2017 denial.

[23] The applicant's submissions are unpersuasive that the two October 2017 letters do not constitute denials because they are improper, lacking a clear and unequivocal denial of the applicant's entitlement to NEB, based on incorrect facts or incorrect understanding of the law, are at odds with the applicant's 2017 OCF-3, premature, and so inaccurate and flawed as to not constitute a reason at all sufficient to trigger the limitation period. If the applicant disagreed with the determination made the respondent regarding her entitlement to NEB for any of these or other reasons, it was open to the applicant to take advantage of the remedy provided by s. 56 of the *Schedule* and apply to the Tribunal to dispute the denials any time up to October 30, 2019 but she failed to do so. The applicant's opinion as to the lack of correctness or sufficiency of the respondent's denials does not extend the time limitation for filing her application.

[24] The applicant's submission that the respondent did not raise the preliminary issue until the case conference is also unpersuasive. The applicant and her legal representative either were or should have been aware of the time limitation issue and that it could arise at the case conference. Raising this issue at the case conference does not affect the respondent's right to do so. It was added as an issue by the Tribunal's June 29, 2020 case conference Report and Order and is properly before me at this hearing.

[25] The applicant did not request a s. 7 extension of the limitation period and as a result has not met her onus to establish reasonable grounds for an extension under s. 7 of *LAT Act* and I decline to exercise my discretion to extend the deadline. Further analysis of the applicant's NEB claim on the merits is not required as I have found the applicant's claim is statute barred.

Are the Applicant's Physical Injuries Within the MIG?

[26] The applicant's position is that her injuries from the accident cannot be treated within the MIG because of her chronic pain. The respondent's position is that the applicant's physical injuries are minor, the applicant has not satisfied her onus to prove that she is out of the MIG with medical evidence because of alleged chronic pain.

[27] I find that as a result of the accident the applicant suffered sprain and strain type injuries which are within the MIG. After the accident initial scans at the hospital were negative and she was diagnosed by the emergency physician with soft tissue injuries. Dr. Selvananthan, applicant's family physician, diagnosed the applicant with soft tissue injuries post-accident.

[28] This is consistent with the opinion of the respondent's general practitioner assessor Dr. Safir who opined in April 2019 that the applicant sustained minor injuries as a result of the accident and that the applicant's pre-existing restless leg syndrome condition does not constitute compelling medical evidence of a pre-existing condition that will prevent the applicant from achieving maximal recovery within the MIG. The applicant did not report any complaints in her lower extremities post-accident.

Should the Applicant Be Removed From the MIG?

[29] I find that the applicant does not have chronic pain resulting from the accident justifying treatment beyond the MIG based on the weight of the medical evidence.

[30] There is little evidence of any physical limitations or effect on the applicant's activities of daily living from her pain. The applicant returned to full-time employment as a nurse in December 2017. The weight of the evidence is that she remains independent in her self-care tasks and there is no significant evidence of other physical or psychological effects as a result of pain. There is no psychological diagnosis post-accident.

[31] There is no significant use of prescription medication until several years post-accident. The applicant appears to have taken some anti-inflammatory medication in the months post-accident but was not prescribed further pain medication until several years later.

[32] The applicant saw her family physician few times between the accident and December 2017. The next time the applicant complained to her family physician about accident-related injuries was more than two years post-accident including on February 3, 2020 when she complained of upper back pain and right shoulder pain since the accident. The applicant was diagnosed with upper back pain and right shoulder pain but her family physician did not attribute the cause of either of these complaints to the accident clearly in the medical record for either during the February 3rd visit, or the applicant's subsequent July 8, 2020 visit. I find there is insufficient evidence of any causal connection between these complaints of back

and shoulder pain in 2020 and the accident to establish that the applicant's pain is caused by the accident.

[33] Although the applicant's family physician referred her to Drs. Manokaran and Ruban, rheumatologists, and Dr. D'Souza at Scarborough Chronic Pain and Migraine Clinic, there is no persuasive evidence establishing that these referrals were necessary as a result of the accident as opposed to the applicant's other medical issues.

[34] Further, none of these specialists clearly attribute the applicant's pain to injuries suffered in the accident although they note that the applicant self-reported that she thinks that is when her pain started. Dr. Manokaran opined that in his July 21, 2020 report that her right shoulder girdle pain is not uncommon in patients with chronic shoulder problem. Dr. Ruban opined in his August 3, 2018 report that much of her symptoms may be related to restless leg syndrome. Dr. D'Souza noted in his September 24, 2020 report that the applicant doesn't have low back pain anymore, on examination noted she was in "mild pain and distress", is currently working and her job demands include working on computer, sitting, lifting, carrying, bending, walking and standing and that the applicant is not interested in nerve block for now. Dr. D'Souza diagnosed posttraumatic right cervical spine dysfunction with musculoligamentous injury, latissimus dorsi strain right greater than left, and queried mild right rotator cuff tendinopathy but not chronic pain syndrome.

[35] The burden of bringing forward persuasive medical evidence of her alleged condition is on the applicant and she has not done so.

Is the Applicant Entitled to the Physiotherapy Treatment Plans for $340.00, $1,965.00 and $2,965.00 ("Disputed Treatment Plans")?

[36] The applicant's position is that the disputed treatment plans are reasonable and necessary. The respondent's position is the opposite.

[37] Correspondence filed by the respondent dated July 9, 2018 indicates that the respondent has already approved the $3,500.00 maximum funding available under the MIG. This was not addressed by the applicant in submissions. Therefore, I find that the applicant has already been provided with the funding available to her in the MIG. Having found the applicant's injuries can be treated in the MIG, it is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans.

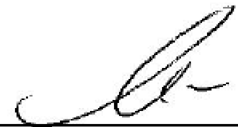
Interest

[38] As no benefits are payable, no interest is payable.

ORDER

[39] For the reasons above, the applicant is barred from proceeding with her application for NEB. The applicant sustained minor injuries as defined under the Schedule and is subject to the $3,500.00 funding limit, which has already been provided by the respondent. It is therefore unnecessary to consider the reasonableness or necessity of the disputed treatment plans. No interest is payable.

Released: September 17, 2021



Avril A. Farlam
Vice Chair