Citation: Lee v. Aviva Insurance Company of Canada, 2021 ONLAT 20-006110/AABS

Licence Appeal Tribunal File Number: 20-006110/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:

Sheung Lun Lee

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce, Vice-Chair**

APPEARANCES:

For the Applicant: Sheung Lun Lee, Applicant
Yu Jian, Paralegal

For the Respondent: Aviva Insurance Company of Canada
Lauren C. Kolarek, Counsel

HEARD In Writing

BACKGROUND

[1] The applicant was involved in an automobile accident on October 2, 2017, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule Effective September 1, 2010* ("*Schedule*"). The applicant was denied certain benefits by the respondent based on its determination that the Minor Injury Guideline ("MIG") applied. The applicant disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES

[2] The issues in dispute are as follows:

a. 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 and in the MIG?

b. Is the applicant entitled to a non-earner benefit ("NEB") in the amount of $185.00 per week from October 30, 2017 to October 2, 2019?

c. Is the applicant entitled to an examination expense in the amount of $2,200.00 for a psychological assessment recommended in a treatment plan submitted on October 15, 2018 and denied by the respondent on December 5, 2018?

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

RESULT

[3] The applicant has not demonstrated that he sustained a complete inability to carry on a normal life as a result of the accident in order to receive a NEB. He has not demonstrated that his accident-related impairments warrant removal from the MIG or that the assessment is reasonable and necessary.

ANALYSIS

Applicability of the MIG

[4] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured sustains impairments that are predominantly a minor injury in accordance with the MIG. Section 3(1) 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." An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. In all cases, the burden of proof lies with the applicant.

[5] The applicant has not demonstrated that his accident-related impairments warrant removal from the MIG. The applicant's submissions concede that he sustained mainly soft-tissue injuries but that he suffers from chronic pain and psychological impairments that justify treatment beyond the MIG. He relies on the clinical notes and records of his family physician, Dr. Wong, points to an assessment and an OCF-3 dated November 16, 2017 completed by chiropractor, Dr. Hutchison, and a pre-screening assessment by psychologist Dr. McDowall from October 15, 2018.

[6] The Tribunal has determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. Here, however, the applicant has never been diagnosed with chronic pain syndrome and, other than two back pain complaints to Dr. Wong, has not demonstrated that he has ongoing pain that causes functional impairment, which is what he must prove in the absence of a diagnosis. In this vein, I agree with Aviva that the applicant has not engaged with any of the six criteria for assessing chronic pain claims from the *AMA Guides* that the Tribunal has adopted as an interpretive tool and has not met the three required for removal on this ground.

[7] In any event, on October 2, 2018, Dr. Wong notes that the applicant's back pain "is a lot better." There are no referrals to a chronic pain specialist and there is no dependence on prescription pain medication. As an 83-year-old gentleman who has seemingly continued to assist his son at work, it is difficult to find that the soft-tissue injuries identified in the medical documentation have developed into a chronic pain condition that warrants removal from the MIG. I find no reason to interfere with Dr. Jugnundan's opinion from the s. 44 report that the applicant sustained soft-tissues injuries and nonspecific intermittent low back pain.

[8] Similarly, there is limited evidence to support the applicant's position that he sustained psychological impairments as a result of the accident the warrant removal from the MIG. He relies on the pre-screen report of Dr. McDowall that was appended to the OCF-18 in dispute and completed over one-year post-accident. The opinion is based solely on the applicant's subjective reporting. While there is a notation for sleep issues in Dr. Wong's records following the

accident, there is no other objective contemporaneous or corroborative evidence to support an accident-related psychological impairment. Dr. Hutchison's diagnosis in the OCF-3 of generalized anxiety disorder is not medical evidence and, in any case, is beyond the scope of his practice as a chiropractor.

[9] I prefer the s. 44 reports of Dr. McCutcheon from November 20, 2017 and May 22, 2018, where in-person, objective testing twice revealed no indication of a diagnosable psychological condition in the applicant. The applicant reported to Dr. McCutcheon that he did not have any significant worries or concerns, is not irritable, has no interpersonal conflicts and continues to socialize. I find Dr. McCutcheon's reports to be in line with the bulk of the medical evidence and agree with Aviva that the applicant has demonstrated that he sustained an impairment that warrants removal from the MIG.

Is the assessment reasonable and necessary?

[10] Having determined that the applicant has not demonstrated that removal from the MIG is required, it is my understanding that the limits of the MIG have been exhausted. Accordingly, the applicant is not entitled to payment for the psychological assessment recommended by Dr. McDowall in the OCF-18 in dispute and an analysis of whether it is reasonable and necessary is not required. As no benefits are overdue, it follows that no interest is payable.

NEB

[11] The applicant also sought an NEB as a result of the accident. Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the 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. Section 3(7)(a) defines a "complete inability to carry on a normal life" as "an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident." The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mut. Ins. Co.*, 2009 ONCA 391, which focuses on a comparison of the applicant's pre- and post-accident activities.

[12] Problematically, the applicant has not engaged with those principles despite having the burden of proof. While he properly cited to *Heath* and the fact that the Tribunal should afford greater weight to activities he values, he did not provide submissions on his pre-accident activities or how his engagement in those activities has changed as a result of the accident. His submissions did not identify activities he values or, really, how his impairments continuously prevent

him from engaging in the activities he normally engaged in pre-accident, just that "all pre-accident activities have been impacted." It remains unclear what those activities are or how Dr. Hutchison arrived at his determination in the OCF-3.

[13] The applicant reported to Dr. McCutcheon that he continued to work four to six hours per day with his son and that there was no change to his hobbies and activities of daily living post-accident. The applicant also reported to Ms. Rutledge, occupational therapist, that he remained independent with his self-care tasks. I find these reports of function are consistent with the dearth of accident-related complaints in Dr. Wong's records, as well as the findings by Dr. Jugnundan in his s. 44 report. On the medical evidence, I see no reason to interfere with Aviva's determination that was based on an unchallenged multidisciplinary s. 44 assessment that payment for an NEB was not warranted.

[14] With respect, while I am alive to the fact that the applicant is an elderly gentleman, the evidence presented is not sufficient to meet the strict test for entitlement to an NEB for the period in dispute. I find this is especially so where I have already determined that the applicant failed to demonstrate that he sustained anything but predominantly minor injuries as a result of the accident. Accordingly, I find the applicant has not demonstrated that he suffered a complete inability to carry on a normal life as a result of the accident and he is not entitled to payment for an NEB for the period in dispute.

CONCLUSION

[15] The applicant has not demonstrated that he sustained a complete inability to carry on a normal life as a result of the accident in order to receive a NEB. He has not demonstrated that his accident-related impairments warrant removal from the MIG or that the treatment plan is reasonable and necessary.

Released: October 27, 2021

Jesse A. Boyce, Vice-Chair