



Citation: Kwon v. Economical Ins. Co., 2021 ONLAT 20-006390/AABS

Licence Appeal Tribunal File Number: 20-006390/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:

Eun Ja Kwon

Applicant

and

Economical Insurance Company

Respondent

DECISION

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

APPEARANCES:

For the Applicant: Jae H. Cho, Counsel

For the Respondent: Jonathan Charland, Counsel

HEARD: In Writing

BACKGROUND

- [1] The applicant was injured in an automobile accident on January 20, 2018, and sought various benefits from the respondent, Economical, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“*Schedule*”). The applicant was denied the treatment on the basis that she sustained predominantly minor injuries that are treatable within the Minor Injury Guideline (MIG). She applied to the Tribunal for resolution of the dispute.

ISSUES IN DISPUTE

- [2] The following issues are in dispute:
- i. Are the applicant’s injuries predominantly minor as defined in the *Schedule* and subject to a \$3,500 treatment limit under the MIG?
 - ii. Is the applicant entitled to receive non-earner benefits (NEB) in the amount of \$185 weekly for the period of January 20, 2018 to date and ongoing, submitted March 19, 2018, and denied by the respondent on May 28, 2018?
 - iii. Is the applicant entitled to receive medical benefits in the amount of \$1,295.77 for physiotherapy services recommended by North York Physiotherapy Clinic in a treatment plan, submitted June 28, 2018, and denied by the respondent on July 19, 2018?
 - iv. Is the applicant entitled to receive medical benefits in the amount of \$1,692.53 for physiotherapy services recommended by North York Physiotherapy Clinic in a treatment plan, submitted August 30, 2018, and denied by the respondent on September 18, 2018?
 - v. Is the applicant entitled to receive medical benefits in the amount of \$1,427.28 for physiotherapy services recommended by North York Physiotherapy Clinic in a treatment plan, submitted November 27, 2018, and denied by the respondent on December 31, 2018?

RESULT

- [3] The applicant sustained predominantly minor injuries that are treatable within the MIG. As her injuries are within the MIG, the treatment plans in dispute are not reasonable and necessary. The applicant has not demonstrated she suffered a complete inability to carry on a normal life and is therefore not entitled to an NEB.

ANALYSIS

The applicant is within 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. The Tribunal has also determined that chronic pain with functional impairment or a psychological impairment warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.
- [5] While her submissions do not engage with the test directly, as I understand it, the applicant submits that she suffers from chronic pain in her neck, left shoulder, lower back, left knee and left leg as a result of the accident, as well as symptoms of depression and anxiety that warrant removal from and treatment beyond the MIG. She also cites to her history of osteoarthritis, Type 2 Diabetes, high blood pressure and high cholesterol. To this end, she relies on an OCF-3 dated March 6, 2018 that identifies concussion/superficial injury of scalp/lumbar and other intervertebral disc disorders with radiculopathy, WAD 2, dislocation and sprain and strain injuries to her thorax, shoulder, spine and pelvis, as well as various clinical notes and records.
- [6] In response, Economical submits there is a lack of objective medical evidence to support the applicant’s claims or to justify removal from the MIG on any of the grounds advanced. It relies on s. 44 occupational therapy, neurology, physiatry and psychology assessment reports that were prepared in response to her NEB and OCF-18 claims. It submits that the applicant is within the MIG and has not demonstrated a complete inability to carry on a normal life or that the OCF-18s in dispute are reasonable and necessary.
- [7] I agree with Economical. The applicant’s physical impairments fall within the definition of a minor injury under s. 3 as they are identified as sprain and strain-type injuries for which she received physiotherapy. The OCF-3 provides several generic descriptor codes for the other impairments identified, so it is difficult to parse out which impairments, other than pain, she believes do not fall within the s. 3 definition. In any case, on the evidence before the Tribunal, I find no reason to interfere with the s. 44 reports of Dr. Ismail and Dr. Czok, who found that the applicant’s cervical and lumbar sprain/strain had resolved and that there was no objective musculoskeletal impairment as a result of the accident.

- [8] In a similar vein, despite the applicant's submission that she suffers from depression and anxiety, I was not directed to accident-related psychological complaints in the family physician records and the applicant did not direct the Tribunal to a DSM-V diagnosis of a psychological impairment by any of her treating practitioners or any of the s. 44 assessors. There is also no evidence of a concussion in any of the medical documentation advanced that would justify removal on this ground.
- [9] While the applicant refers to her pre-accident conditions, she has not provided a medical opinion that these conditions were exacerbated by the accident or would prevent her recovery if she is kept within the MIG, as is required for removal by s. 18(2). Similarly, while she submits that she suffers from chronic pain, there was no discussion of her functional impairment and the Tribunal was not directed to a diagnosis of chronic pain. The applicant also did not engage with any of the six criteria under the *AMA Guides* that the Tribunal has adopted as an interpretive tool in the absence of a diagnosis. The Tribunal would have benefitted from specific submissions. As a result, there is no medical evidence to support that the applicant sustained impairments that require treatment beyond the MIG.

The treatment plans are not reasonable and necessary

- [10] To receive payment for a treatment plan under the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. The applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving same are reasonable.¹
- [11] Having determined that the applicant sustained predominantly minor injuries as a result of the accident, it is my understanding that the \$3,500 limit of the MIG has been exhausted. Where there are no remaining funds and where the applicant has not demonstrated that treatment beyond the MIG is required, it follows that she is not entitled to payment for any of the treatment plans in dispute, as they are not reasonable and necessary and were denied pursuant to properly scheduled s. 44 assessments. As no benefits are overdue, it follows that no interest applies under s. 51.

The applicant is not entitled to an NEB

- [12] 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

¹ See, *General Accident Assurance Co. of Canada v. Violi* (FSCO Appeal P99-00047)

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, generally, requires a comparison of the applicant’s pre- and post-accident activities.

- [13] Unfortunately, the applicant did not engage with these principles despite having the burden of proof. While the OCF-3 in evidence checked the NEB box and indicates she is “unable to tolerate most of her daily activities without aggravating the current injury”, her submissions did not address *Heath*, did not detail any of her pre-accident activities or demonstrate how her engagement in those activities has changed as a result of the accident. Her submissions did not identify activities she values or how her pain continuously prevents her from engaging in the activities she normally engaged in. While the Tribunal notes the applicant’s advanced age, it remains unclear how Dr. Kim arrived at the NEB determination in the OCF-3.
- [14] For these reasons, the applicant’s submission that the evidence clearly shows that she suffers a complete inability to carry on a normal life falls well short of meeting her burden. I see no reason to interfere with the s. 44 reports that all determined she was not entitled to an NEB based on her continued ability to socialize, volunteer, attend church and act as a matchmaker post-accident. Accordingly, the applicant is not entitled to an NEB for the period in dispute.

CONCLUSION

- [15] The applicant sustained predominantly minor injuries that are treatable within the MIG. As her injuries are within the MIG, the treatment plans in dispute are not reasonable and necessary. The applicant has not demonstrated that she suffered a complete inability to carry on a normal life and is not entitled to an NEB.

Released: January 25, 2022



Jesse A. Boyce, Vice-Chair