Citation: Mohamed v. Allstate Insurance Company of Canada, 2023 ONLAT 22-004160/AABS

Licence Appeal Tribunal File Number: 22-004160/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:

Mohodin Mohamed

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Kevin Lundy**

APPEARANCES:

For the Applicant: Mohodin Mohamed, Applicant (Absent)

For the Respondent: Kajita Kamal, Representative
Sonya Katrycz, Counsel

Interpreter: Fouzia Ahmed - (Arabic language)

Heard by Videoconference: **July 19, 2023**

OVERVIEW

[1] Mohodin Mohamed ('the applicant') was involved in an automobile accident on March 11, 2021 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the '*Schedule*'). The applicant was denied benefits by Allstate Insurance Company of Canada ('the respondent') and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the 'Tribunal') for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

1. Are the applicant's injuries predominantly minor as defined in section 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 Minor Injury Guideline limit (the 'MIG')? The parties agreed at the case conference that the MIG limits had not been exhausted.

2. Is the applicant entitled to an income replacement benefit in the amount of $400.00 per week from March 18, 2021 to date and ongoing?

3. Is the applicant entitled to $2,655.00 for physiotherapy services proposed by Knead Wellness in a treatment plan dated August 20, 2021?

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

RESULT

[3] I find that:

a. The applicant's injuries are predominately minor and therefore subject to the treatment within the $3,500.00 limit of the MIG;

b. The applicant has failed to demonstrate entitlement to an income replacement benefit;

c. The applicant has failed to demonstrate that the $2,655.00 for physiotherapy services as proposed by Knead Wellness in a treatment plan dated August 20, 2021 is reasonable and necessary; and

d. Given that there are no benefits owed, the applicant is not entitled to interest pursuant to section 51 of the *Schedule*.

PROCEDURAL ISSUES

[4] On January 31, 2023, the applicant attended a case conference with his then paralegal, Arthur Semko. At the parties were unable to resolve the issues in dispute, the Tribunal scheduled a two day videoconference hearing in this matter.

[5] On March 20, 2023, the Tribunal served all parties with notice of the present hearing. This notice was sent both to the applicant directly, as well as his legal representative. The notice mailed to the applicant was not returned by Canada Post to the Tribunal as non-deliverable.

[6] On July 6, 2023, Mr. Semko submitted a notice of motion requesting, amongst other orders,

a. An order removing him and P&M Personal Injury Law as counsel of record for the applicant;

b. An order directing that all further documents related to the application shall be served on the applicant at his last known address; and

c. An order rescheduling the July 19 and 20, 2023 hearing.

[7] Mr. Semko also filed a certificate of service confirming that he served the applicant with a copy of the motion by mail on July 6, 2023. The mailing address provided by Mr. Semko for the applicant matched the address to which the Notice of Hearing had been mailed on March 20, 2023.

[8] In a motion order issued on July 11, 2023, the Tribunal granted the request to remove Mr. Semko and his firm as lawyers of record. The Tribunal declined to reschedule the hearing dates as that request should have been made via an adjournment form rather than added to a motion. The Tribunal did not receive an adjournment request from the applicant following the issuance of the motion order.

[9] On July 12, 2023, the Tribunal contacted the applicant by email to remind him that the two-day video conference hearing remained scheduled to begin on July 19, 2023 at 9:30 a.m. In the same email, the Tribunal asked the applicant to advise whether he intended to retain a new legal counsel or to represent himself at the hearing. The Tribunal received no response to this email.

[10] The applicant did not call into the videoconference at the start of the hearing. Counsel for the respondent advised that the Tribunal had succeeded in contacting the applicant by telephone the day before the hearing and reminded

him to call into the videoconference regardless of his intentions for his application. This call was confirmed by an email sent to both parties. At 9:40 a.m., the Tribunal staff again contacted the applicant by telephone. He advised that he did not intend to call into the hearing and would file a notice of withdrawal at some unspecified point in the future. This had not yet occurred as of the start of the hearing. Although he did not directly indicate his intentions with respect to his application, his refusal to call into the hearing despite having received adequate notice of its date and time indicates an intention to not participate in the proceeding. He did not request an adjournment of the hearing to a later date to retain new legal counsel or for any other purpose.

[11] Subsection 7(3) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 (‘*SPPA’*) permits a tribunal to proceed in the absence of a party provided that it has provided notice of the hearing. Furthermore, the Notice of Hearing issued to the applicant included the caution that, “if you do not attend the hearing, the Tribunal may make a decision in your absence and you will not be entitled to any further notice in the proceeding.” As the applicant announced an intention not to participate in the hearing process, no further delay was necessary. The applicant did not call into the hearing before its conclusion

ANALYSIS

The Minor Injury Guideline

[12] I find that the applicant failed to meet his evidentiary onus to demonstrate that his injuries are predominantly minor as defined in section 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 MIG limit.

[13] Subsection 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.” Subsection 18(1) of the *Schedule* prescribes a $3,500.00 limit on medical and rehabilitation benefits payable for any one accident.

[14] The applicant bears the burden of proving, on a balance of probabilities, that his injuries are not minor within the meaning of the *Schedule*.

[15] Despite the fifteen months that have passed since he filed his application to the Tribunal on April 7, 2022, and numerous requests for production from the respondent, the applicant failed to provide necessary information to support his claims. Although the respondent complied with all of its obligations under the

case conference order and report issued February 24, 2023 with respect to production, the applicant failed to provide any of the items listed in that order.

[16] In the absence of evidence with respect to the applicant's health either before or after the accident, I find that he has failed to demonstrate that his injuries could not be treated within the limits of the MIG.

Entitlement to Income Replacement Benefits

[17] I find that the applicant has also failed to demonstrate on the balance of probabilities that he is entitled to an income replacement benefit ('IRB') in the amount of $400.00 per week from March 18, 2021 to date and ongoing.

[18] The test for entitlement to payment of an income replacement benefit ('IRB') is set out in subsection 5(1) of the *Schedule*. Subsection 5(1) provides that the applicant is entitled to an IRB if he can demonstrate on a balance of probabilities that he was employed at the time of the accident and, as a result of the accident, he suffered a substantial inability to perform the essential tasks of his pre-accident employment.

[19] The applicant has failed to provide an OCF-2 Employer's Confirmation Form ('OCF-2') to the respondent in support of his claim for an IRB. He also has not disclosed any post-accident medical documents other than one x-ray from July 2021 that confirmed the absence of any abnormalities in his spine and prescriptions for Naproxen, also from July 2021. The respondent has received no other information regarding the applicant's health following the accident or his employment before or after the accident, including his income in the fifty-two weeks prior to the accident.

[20] At the January 31, 2023 case conference, counsel for the respondent set out her concerns over the absence of productions and noted that any assessment of the applicant's entitlement to IRBs was impossible without an OCF-2 or at the very least some information on his income and pay status. Pursuant to the case order and report and on the consent of the parties, the Tribunal ordered the applicant to produce a list of thirteen items requested in the respondent's case conference summary as well as including bank records and pay stubs from one year pre-accident to the date of the case conference and clinical notes and records for walk-in clinics attended by the applicant from one year pre-accident to the date of the case conference. The applicant did not request a production order or an award. As of the date of the present hearing, the applicant had not disclosed any of the documents listed in the case conference order to the respondent.

[21] In *Owusu* v. *TD Home & Auto Insurance Company et al.*, 2010 ONSC 6627 at paragraph 8, the Ontario Superior Court held that "there is no presumption of entitlement created in the legislation, nor should one be implied." In the absence of a filed OCF-2, any income related documents or evidence related to his employment status, the applicant has failed to discharge his evidentiary burden to demonstrate entitlement to an IRB.

Entitlement to Physiotherapy Treatment Plan

[22] The applicant has failed to demonstrate that the $2,655.00 for physiotherapy services as proposed by Knead Wellness in a treatment plan dated August 20, 2021 is reasonable and necessary.

[23] As the Tribunal held in *J.W.* v. *Security National Insurance Company*, 2020 CanLII 30385 (ON LAT), the onus is on the applicant to prove on a balance of probabilities that his entitlement and expenses are reasonable and necessary. Any expenses must be proven to have been incurred or deemed to be incurred because the respondent unreasonably delayed or withheld payment of a benefit.

[24] The act of filing an OCF-18 alone is not sufficient to demonstrate that a given treatment plan is reasonable or necessary. As the applicant submitted no evidence with respect to his health before or after the accident, I find that he has failed to demonstrate that the proposed treatment plan is reasonable or necessary.

Interest

[25] Interest applies on the payment of any overdue benefits pursuant to section 51 of the *Schedule.* As I find that the applicant is not entitled to the disputed benefits, none of them are overdue and therefore no interest is payable by the respondent.

Costs

[26] I agree with the respondent that given his decision not to participate in the hearing, the very least the applicant could have done to minimize the prejudice to the respondent in preparing for and attending at the hearing would have been to file his proposed notice of withdraw in timely manner prior to the scheduled start of the hearing itself. The parties are bound by a mutual duty of good faith.

[27] However, the threshold to award costs is extremely high, particularly in the case of a self-represented litigant. I find that the respondent has not met the test set out in Rule 19 of the Tribunal's *Common Rules of Practice and Procedure, Version I* (October 2, 2017) as amended (the 'Rules') as I find the actions of the

applicant insufficient to award costs. The test to find bad faith and unreasonable, frivolous, vexatious behaviour is very high. I do not find that the applicant's conduct in simply abandoning his application has met this threshold.

[28] As a result, I decline to order costs under the circumstances.

ORDER

[29] The applicant's injuries are predominantly minor as defined in section 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 MIG limit.

[30] The applicant is not entitled to an income replacement benefit.

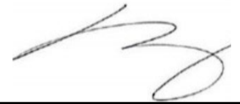
[31] The applicant is not entitled to $2,655.00 for physiotherapy services as proposed by Knead Wellness in a treatment plan dated August 20, 2021.

[32] Given that there are no benefits owed, the applicant is not entitled to interest pursuant to section 51 of the *Schedule*.

[33] No costs are payable.

[34] The application is dismissed.

Released: August 24, 2023



Kevin Lundy
Adjudicator