



**Citation: Kannakimmah v. Pembridge Insurance Company, 2023 ONLAT 22-000286/AABS**

**Licence Appeal Tribunal File Number: 22-000286/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:

**Jeyachandran Kannakimmah**

**Applicant**

and

**Pembridge Insurance Company**

**Respondent**

## **DECISION**

**ADJUDICATOR:** Laura Goulet

**APPEARANCES:**

For the Applicant: Jeyachandran Kannakimmah, Applicant (did not attend)

For the Respondent: Sonya Katrycz, Counsel

Interpreter (Tamil language): Naga Ramalingam

**HEARD: by Videoconference: July 31, 2023**

## OVERVIEW

- [1] Jeyachandran Kannakimmah, the applicant, was involved in an automobile accident on December 17, 2019, 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 the respondent, Pembridge Insurance Company, 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:
- i. Is the applicant entitled to an income replacement benefit (“IRB”) in the amount of \$400.00 per week from June 11, 2020 to June 1, 2022?
  - ii. Is the applicant entitled to chiropractic services proposed by Gibson Wellness Centre, as follows:
    - a) \$11,498.80, submitted September 13, 2021 and denied September 27, 2021;
    - b) \$11,498.80 submitted July 22, 2021 and denied August 4, 2021;
    - c) \$11,498.80 submitted April 29, 2021 and denied May 11, 2021;
    - d) \$3,135.75 submitted September 7, 2020 and denied March 23, 2021; and
    - e) \$5,091.80 submitted July 7, 2020 and denied July 9, 2020?
  - iii. Is the applicant entitled to \$2,473.65 for occupational therapy services proposed by Gibson Wellness Centre, submitted March 12, 2021 and denied March 23, 2021?
  - iv. Is the applicant entitled to interest on any overdue payment of benefits?
  - v. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
- [3] **Added issue:** At the end of the hearing, the respondent requested costs against the applicant.

## **RESULT**

- [4] The applicant is not entitled to an IRB, chiropractic services or occupational services.
- [5] The applicant is not entitled to interest on any overdue payment of benefits.
- [6] The respondent is not liable to pay an award.
- [7] The respondent is not entitled to costs.

## **ANALYSIS**

- [8] A case conference was held by teleconference on November 3, 2022. The applicant was present. In the Case Conference Report and Order (“CCRO”) dated January 13, 2023, the Tribunal ordered that document briefs be exchanged between the parties and filed no later than 10 calendar days before the hearing.
- [9] This matter was originally scheduled for a 5-day hearing to commence on June 12, 2023. The applicant’s previous counsel brought a motion on April 25, 2023 requesting to be removed from the record and requesting an adjournment of the hearing to allow the applicant to obtain new counsel. The motion was granted, and the matter was scheduled for a 5-day videoconference hearing to commence at 9:30 a.m. on July 31, 2023. The Tribunal sent a Notice of Videoconference Hearing to the applicant by email on June 23, 2023.
- [10] On the first day of the hearing, the applicant did not attend. The respondent’s counsel was in attendance.
- [11] The applicant did not serve or file any documents in support of their appeal. On July 21, 2023, the respondent served and filed their document brief.
- [12] The respondent contacted the Tribunal several times, advising that it had not heard from the applicant since counsel was removed from the record in May, nor had it received a hearing brief from the applicant. Since it was incurring costs in preparing for the hearing, the respondent asked the Tribunal if it would try to reach the applicant to determine whether they intended to proceed with the hearing.
- [13] On July 26, 2023, the Case Management Officer (“CMO”) reached out by telephone to the applicant, who advised that they would be proceeding with the hearing without representation. The CMO sent another Notice of

Videoconference Hearing to the applicant by email, along with a Guide to Videoconferencing Proceedings and Zoom.

- [14] When the applicant did not attend at the hearing, the CMO sent the applicant an email and tried to reach them by telephone. The applicant did not answer the phone and the CMO could not leave a message as the voicemail had not been set up.
- [15] The video conference hearing was convened on July 31, 2023, as scheduled. Despite the Tribunal and the respondent's counsel waiting until 10:21 a.m., the applicant did not attend. At this point, the hearing commenced, pursuant to section 7(3) of the *Statutory Powers Procedure Act* ("SPPA"), which provides that where notice of an electronic (e.g. by video conference) hearing has been given to a party to a proceeding, and the party does not attend at the hearing, the Tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding. Having considered the procedural history outlined above, I am satisfied that the applicant had proper notice of the hearing.
- [16] The applicant did not present any evidence at the hearing, nor was any evidence filed. The respondent submitted that the applicant has failed to discharge their burden of proof with respect to their claims.
- [17] I agree. It is the applicant's burden to demonstrate entitlement to the benefits in dispute. Since the applicant failed to attend and did not present any evidence, the applicant did not meet their burden of proof with respect to any of the claims. Accordingly, I find that the applicant is not entitled to any of the benefits claimed.

***The applicant is not entitled to interest***

- [18] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. Since the applicant did not demonstrate that there are any overdue benefits owing, the applicant is not entitled to any interest.

***The applicant is not entitled to an award***

- [19] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. No evidence was presented in this regard by the applicant. As such, the applicant is not entitled to an award.

***The respondent is not entitled to recover costs***

- [20] At the hearing, the respondent sought an award of costs against the applicant. Based on the totality of the circumstances, I find that the respondent is not entitled to recover costs.
- [21] The Tribunal's authority to award costs stems from section 17.1 of the *SPPA*, which empowers the Tribunal to order a party to pay another party's costs in a proceeding, according to the rules made by the Tribunal under 17.1(4). Section 17.1(2) of the *SPPA* states that the Tribunal shall not order a party to pay costs unless the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious, or a party has acted in bad faith.
- [22] Rule 19.1 of the Tribunal's *Common Rules of Practice and Procedure* ("Rules") mirrors the language of s. 17.1(1) of the *SPPA* and provides that a party may make a request to the Tribunal for costs where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.6 restricts the amount of costs to a maximum of \$1,000.00 for each full day of attendance.
- [23] Prior to April 1, 2016, under s.282(11) of the *Insurance Act*, an arbitrator's jurisdiction and discretion to award expenses was broad. Unlike Rule 19.1, arbitrators at the Financial Services Commission of Ontario could consider criteria other than vexatious, unreasonable, frivolous and bad faith behaviour of a party, such as a party's degree of success in the outcome of the proceeding, the conduct of a party, or a party's representative, the failure of a party to comply with undertakings or orders, any written offers to settle, and/or any aspect that was improper, vexatious or unnecessary.
- [24] Section 281(11) of the *Insurance Act* was repealed on April 1, 2016. The Tribunal's opinion is that the repeal of s. 281(11) is a clear statement of the Legislature's intent to limit the circumstances where the Tribunal can award costs in a proceeding.
- [25] The onus is on the respondent to prove on a balance of probabilities that the applicant acted unreasonably, frivolously, vexatiously, or in bad faith. The respondent submitted that the following conduct of the applicant was unreasonable, vexatious and frivolous.
- [26] The respondent submitted that the applicant had counsel until May of 2023 and they were provided with an adjournment to have an opportunity to retain new counsel. When the Tribunal contacted the applicant, they advised that they were

proceeding to the hearing. The respondent submitted that at the very least, the applicant should have advised at that time that they did not intend to proceed. Based on the applicant confirming just prior to the hearing that they intended to proceed, the respondent continued to incur the costs of preparing for the hearing, including preparation fees for two expert witnesses. Further, the Tribunal expended time and resources for the hearing that did not proceed due to the non-attendance of the applicant.

- [27] The respondent referred to section 19.5 of the *Rules*, submitting that:
- i. failing to attend for a 5-day hearing should be considered serious misconduct;
  - ii. the applicant was in breach of two orders issued by the Tribunal, i.e. failing to provide a hearing brief and failing to attend for the hearing;
  - iii. by not attending for the hearing after advising the Tribunal the week prior that they were attending, and by not serving and filing a hearing brief, the applicant's behaviour interfered with the Tribunal's ability to carry out a fair, efficient and effective process; and
  - iv. the respondent has been prejudiced by the applicant's conduct in that the respondent continued to expend time and incur costs preparing for the hearing.
- [28] The respondent sought a cost award of \$500.00.
- [29] In order to award costs a party must adduce evidence of unreasonable, frivolous, vexatious or bad faith behaviour in a proceeding and I am not persuaded that the applicant's conduct has reached that threshold. One can only speculate with respect to the reason why the applicant did not attend at the hearing.
- [30] Cost awards under Rule 19 are to maintain civility and order during proceedings, to deter conduct that threatens the orderly and civil resolution of an application, and to ensure that the Tribunal's process and the other participants are respected. They are not to compensate parties for suffering an inconvenience or for the cost of their involvement in a proceeding.
- [31] For the reasons outlined above, I find that the respondent has not provided sufficient evidence to satisfy Rule 19.1 and the claim for costs is dismissed.

## ORDER

- [32] The applicant is not entitled to payment of an IRB, chiropractic services, or occupational therapy services.
- [33] The applicant is not entitled to any interest.
- [34] The applicant is not entitled to an award.
- [35] The respondent is not entitled to costs.

**Released:** September 19, 2023



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**Laura Goulet**  
Adjudicator