Citation: Cokorilo v. The Co-operators, 2023 ONLAT 21-010456/AABS

Licence Appeal Tribunal File Number: 21-010456/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:

Dalibor Cokorilo

Applicant

and

The Co-operators

Respondent

DECISION

VICE-CHAIR: **Brett Todd**

APPEARANCES:

For the Applicant: Tania Fleming, Paralegal

For the Respondent: Peter Durant, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

OVERVIEW

[1] Dalibor Cokorilo (the "applicant") was involved in a motor vehicle accident on December 5, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The Co-operators (the "respondent") determined that the applicant should be treated within the Minor Injury Guideline (the "MIG") and its $3,500.00 limit on treatment, and also denied a treatment plan/OCF-18. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] In contravention of the Case Conference Report and Order ("CCRO") dated September 19, 2022 that set this matter down for a hearing, neither party confirmed the amount remaining within the MIG in their submissions. As a result of a Tribunal query on September 25, 2023, the respondent confirmed that $2,868.73 had been spent, leaving $631.27 remaining under the MIG limit of $3,500.00.

SUBSTANTIVE ISSUES IN DISPUTE

[3] The following substantive issues are in dispute:

1. 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 of the MIG?

2. Is the applicant entitled to $1,250.00 for optometric services in a treatment plan/OCF-18 recommended by Kingsway Eyecare and denied June 23, 2021?

3. Is the applicant entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*?

RESULT

[4] I find that:

i. The applicant sustained a predominantly minor injury as a result of the subject accident. He remains within the MIG and is subject to its $3,500.00 limit on treatment.

ii. The applicant is entitled to the benefits set out in the disputed treatment plan, once incurred, up to the remaining amount of the MIG limit, plus interest in accordance with s. 51 of the *Schedule*, as such benefits are deemed reasonable and necessary pursuant to s. 40(8) of the *Schedule*.

PROCEDURAL ISSUE

[5] I find that the clinical notes and records ("CNRs") of Dr. Adam Shecter, family physician, for the period of June 29, 2022 to April 3, 2023, and all records of All Injury Management were submitted in contravention of the CCRO that set this matter down for a written hearing. As a result, I rely on Rule 9.4 of the Tribunal's *Rules of Practice & Procedure* (the "*Rules*") and choose not to provide my consent for their admission into evidence.

[6] In its submissions, the respondent requests that the CNRs of Dr. Shecter for the period of June 29, 2022 to April 3, 2023 and all records of All Injury Management should be excluded from evidence. The respondent submits that both sets of records were served on April 4, 2023, some 148 days after the deadline for new productions of November 8, 2022 that was established in the CCRO dated September 19, 2022.

[7] Due to this extreme lateness, the respondent argues these records should be excluded as they prejudice its ability to assess the applicant's condition and determine if an insurer's examination should be scheduled. As a remedy, the respondent relies on Rule 9.4 of the *Rules*, which provides that a party may not rely on a document as evidence without the consent of the Tribunal. The respondent also relies on *Osei-Kumi v. Certas Home and Auto Insurance Company*, 2023 CanLII 2691 (ON LAT), a recent Tribunal decision that excluded late productions.

[8] The applicant does not dispute in reply submissions that these records were provided late. He notes that his written argument does not reference the All Injury Management records at all. However, he does argue for the inclusion of the specified Dr. Shecter CNRs. The applicant references s. 33 of the *Schedule* regarding the applicant's duty to provide "[a]ny information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit" in support of his position, writing that these records were provided as a regular update to the insurer and as such should not be deemed prejudicial.

[9] I agree with the respondent. With that said, the respondent is wrong about the dates. The CCRO ordered documents to be produced no later than 60 calendar days from the date of the case conference, which took place on September 19,

2022. This meant that submissions were due on November 18, 2022, not November 8, 2022, and that the productions at issue were actually filed 137 days late, not 148 days late.

[10] Regardless of this typographical error, the respondent has still justified its case that these records should not be allowed into evidence. The applicant has provided no reason at all to include the All Injury Management records, and no valid reason to include the later CNRs of Dr. Shecter. Section 33 of the *Schedule* does not free applicants from the requirements set forth in CCROs, which were very clear in this matter.

[11] I also find *Osei-Kumi v. Certas Home and Auto Insurance Company* to be persuasive. The circumstances were similar. As in that matter, there was a lengthy delay; the applicant failed to provide valid reasons why productions were disclosed so late; and the applicant did not show consideration for either the respondent or Tribunal processes by not filing a motion to request the late submission of these records.

[12] As a result, I rely on Rule 9.4 and choose not to provide consent for the inclusion of the CNRs of Dr. Shecter ranging from June 29, 2022 to April 3, 2023, nor the records of All Injury Management.

ANALYSIS

The Minor Injury Guideline ("MIG")

[13] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured person sustains impairments that are predominantly minor injuries. 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."

[14] An insured person may be removed from the MIG if it can be established that accident-related injuries fall outside of the MIG. Removal from the MIG can also be warranted if there is documentation of a pre-existing condition combined with compelling medical evidence stating that this condition precludes recovery if kept within the MIG, pursuant to s. 18(2) of the *Schedule*. The Tribunal has also determined that chronic pain with a functional impairment or a psychological condition may warrant removal from the MIG.

[15] The burden is on the applicant to demonstrate, on a balance of probabilities, that his injuries fall outside of the MIG.

[16] In this instance, the applicant submits no specific argument regarding the MIG determination issue. Instead, the applicant's submissions focus on his post-accident medical history, including a chronology of treatment that includes specifics regarding the optometric treatment plan in dispute.

[17] The respondent submits that the applicant has failed to present sufficient argument or evidence to warrant removal from the MIG on any grounds. Co-operators acknowledges that the applicant has vision complaints, but argues that the medical evidence does not support a claim that this issue was directly related to the subject accident, nor does it support the existence of any accident-related injury or condition that would fall outside of the *Schedule* definition of a minor injury. As a result, the respondent submits that the applicant should be held within the MIG and its $3,500.00 limit on treatment.

The applicant remains within the MIG

[18] I find that the applicant has failed to demonstrate, on a balance of probabilities, that he suffers from any injury or condition that warrants removal from the MIG.

[19] Despite the MIG being a live issue in dispute as noted on the CCRO dated September 19, 2022, the applicant proffered no submissions or evidence to demonstrate why he should be removed from the MIG. There is nothing on record with the Tribunal to indicate that the MIG determination was resolved or withdrawn as an issue. Yet the MIG issue is not listed as one of the issues in dispute at the top of the applicant's written submissions. Similarly, the MIG is not noted in the following pages, which deal entirely with an argument that the treatment plan in dispute should be found to be reasonable and necessary.

[20] The respondent noted that the applicant's submissions were "completely devoid of any evidence or argument in relation to the MIG determination" and argued that the applicant should be found to remain within the MIG as a result. The applicant did file reply submissions, but again failed to mention the MIG or rebut the respondent's position.

[21] I agree. Accordingly, I cannot find that the applicant has demonstrated that he warrants treatment beyond the MIG. It seems that his position is that the accident caused vertical binocular diplopia (double vision) and blurry vision, injuries that fall outside of the minor injury definition in the *Schedule*, but it is impossible to

definitively determine what he is arguing given the lack of any guidance in his submissions.

[22] Further, I agree with the respondent that the medical evidence does not support a finding that the applicant should be removed from the MIG. A notation on the hospital admittance record from the day after the accident indicates “soft tissue injuries neck and back.” CNRs from Dr. Shecter indicate that the applicant did not discuss any accident-related physical injuries or symptoms with his family physician. X-rays of the applicant’s cervical spine taken on December 6, 2019 were unremarkable. There is no indication in these CNRs that the applicant suffered anything other than soft-tissue physical injuries in the accident.

[23] I agree with the respondent regarding the applicant’s issues with double vision and blurry vision. While I accept that the applicant is suffering from these eye conditions, the applicant has not adequately supported his claim that they are related to the subject accident. Although the applicant complained of “blurred vision” that he attributed to being struck in the face by airbags in the motor vehicle accident at an optometrist appointment on February 22, 2020, he did not follow this up with Dr. Shecter until October 29, 2020, some 10 months after the accident. Dr. Shecter found no cause for these symptoms. Subsequent MRIs of the applicant’s brain, cervical and lumbar spine, and thoracic spine also did not reveal any accident-related issues.

[24] Other medical professionals did not attribute the applicant’s eye issues to the accident. Dr. Jonathan Micieli, opthamologist, examined the applicant on January 19, 2021 and found that his issue was related to dry eyes that could be treated with eye drops. Dr. Miceli also wrote in his record of this appointment that “I have a difficult time relating this to the MVC,” meaning what he categorized as “new onset visual disturbances” involving double vision. Dr. Alexandra Muccilli, neurologist, referenced Dr. Micieli’s opinion in her report dated June 20, 2022 and wrote that the issue had been “resolved with eye drops.” Dr. Muccilli also noted the MRI results described above and that she reassured the applicant that his eye issues did not meet the criteria for more serious medical conditions.

[25] With or without an argument focused on the MIG determination, the applicant has not provided sufficient evidence to indicate support for his claim that he should be removed from the MIG. Accordingly, I find that he remains within the MIG.

The Treatment Plan

[26] Having found that the applicant remains within the MIG, it is not necessary for me to consider the reasonable and necessary nature of the treatment plan in dispute.

[27] However, s. 40(8) of the *Schedule* provides that when the MIG is determined to apply to an insured person following a dispute before the Tribunal, benefits incurred within the MIG limit are deemed to be reasonable and necessary.

[28] Accordingly, the applicant is entitled to the benefits set out in the disputed treatment plan, once incurred, up to the $631.27 remaining under the MIG limit of $3,500.00, as specified in paragraph #2.

ORDER

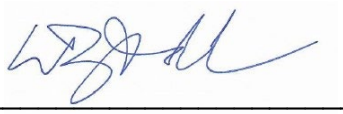
[29] I find that:

i. The applicant has failed to meet his burden to demonstrate that treatment outside of the MIG is warranted. He remains within the MIG.

ii. The applicant is entitled to the benefits set out in the disputed treatment plan, once incurred, up to the remaining amount of the MIG limit, plus interest in accordance with s. 51 of the *Schedule*, as such benefits are deemed reasonable and necessary pursuant to s. 40(8) of the *Schedule*.

iii. The application is dismissed.

Released: October 30, 2023



Brett Todd
Vice-Chair