Citation: Jaroo v. Economical Mutual Insurance Company, 2023 ONLAT 21-007571/AABS

Licence Appeal Tribunal File Number: 21-007571/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:

Forat Jaroo

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Ulana Pahuta**

APPEARANCES:

For the Applicant: Parinita Yadav, Articling Student
Maziar Mortezaei, Counsel

For the Respondent: Alexander Dos Reis, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Forat Jaroo, the applicant, was involved in an automobile accident on June 28, 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, Economical Mutual Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] At the case conference held on November 17, 2022, the respondent raised a preliminary issue, that the applicant had failed to attend a properly scheduled general practitioner's ("GP") insurer's examination ("IE"). It requested a preliminary issue hearing to address whether the applicant should be barred from proceeding with his application, due to non-compliance with s. 44 of the *Schedule*.

[3] By way of a preliminary issue decision dated January 31, 2023, the Tribunal found that the applicant was not compliant with s. 44 of the *Schedule* and that the respondent's notices of examination complied with s. 44(5) and provided sufficient medical reasons. However, the adjudicator permitted the applicant to continue with his application pursuant to s. 55(2), due to the respondent's failure to make reasonable efforts to reschedule the missed IE. After the release of the Tribunal decision, the applicant subsequently attended the GP IE.

ISSUES

[4] The issues in dispute are:

i. 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 Minor Injury Guideline ("MIG") limit?

ii. Is the applicant entitled to $3,305.30 for chiropractic and massage therapy treatment, proposed by Health-Pro Wellness in a treatment plan ("OCF-18") dated November 19, 2019?

iii. Is the applicant entitled to $2,197.29 for a psychological assessment, proposed by Health-Pro Wellness in an OCF-18 submitted on December 4, 2019?

iv. Is the applicant entitled to $3,566.29 for psychological treatment, proposed by Health-Pro Wellness in an OCF-18 submitted on March 18, 2021?

v. Is the applicant entitled to a non-earner benefit ("NEB") of $185.00 per week from August 28, 2019 to June 25, 2021?

vi. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

[5] The applicant sustained minor injuries as defined under the *Schedule* and is subject to the $3,500.00 funding limit. As the applicant is in the MIG and the MIG funding limit has been exhausted, he is not entitled to the OCF-18s in dispute. The applicant is not entitled to NEBs or an award.

ANALYSIS

Minor Injury Guideline

[6] 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 a minor injury. 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."

[7] An insured person 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. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

The applicant has not established accident-related impairments warranting removal from the MIG

[8] The applicant submits that he should be removed from the MIG as a result of his significant physical and psychological impairments.

Physical Impairments

[9] With respect to physical impairments, I find that the applicant has not established injuries that require treatment beyond the MIG funding limits. The applicant has not been diagnosed with any physical impairments outside of soft-tissue sprains and strains and whiplash associated disorder ("WAD"), all of which fall squarely within the definition of a "minor injury".

[10] The clinical notes and records ("CNRs") of the applicant's family physician Dr. Nadin Alo, only show a diagnosis of "back strain" together with pain complaints, in the first few weeks post-accident. However, Dr. Alo's CNRs do not indicate that the applicant reported any accident-related symptoms after October 4, 2019. Although the applicant points to the Disability Certificate ("OCF-3") of Dr. Tarulli, chiropractor, as evidence of his non-minor physical injuries, I agree with the respondent that the physical impairments listed in the OCF-3, strains and sprains and WAD, are minor injuries, treatable within the MIG.

[11] Although the applicant submits that a July 4, 2019 x-ray found slight scoliosis, and spondylosis with grade 1 spondylolisthesis, I agree with the respondent that the applicant has not provided any evidence or a medical opinion indicating that these impairments were accident-related. Nor has the applicant provided any evidence or submissions to establish that these impairments would preclude recovery in the applicant was kept within the treatment limits of the MIG.

[12] Finally, I note that the respondent's GP IE assessor Dr. Howard Platnick found that the applicant had a normal physical examination, and diagnosed the applicant with cervical myofascial strain – WAD-I and lumbosacral myofascial strain – minor. Although in his submissions the applicant argues that these diagnoses reflect non-minor physical injuries, I find that such strain and sprain type impairments fall within the definition of a "minor injury". The applicant has not provided any medical opinion or evidence to rebut Dr. Platnick's finding that the applicant's physical impairments were minor injuries, as defined by the *Schedule*.

Psychological Impairments

[13] I further find that the applicant has not led sufficient evidence to establish that he has sustained accident-related psychological impairments. The CNRs of Dr. Alo only indicate one entry with psychological complaints, soon after the accident. On July 2, 2019, the applicant reported to Dr. Alo that he was "shocked emotionally" at the time of the accident, and that it was hard to sleep, due to back pain. The applicant does not direct me to any subsequent CNR entry where he continued

to report accident-related psychological symptoms, sought psychological treatment, or was diagnosed with a psychological condition by Dr. Alo. I further agree with the respondent that Dr. Tarulli's findings of "malaise and fatigue" listed in the OCF-3, would be outside his scope of practice as a chiropractor.

[14] Both the applicant and the respondent submit psychological assessment reports in support of their claim. The applicant relies on the s. 25 assessment of Dr. Fahimeh Aghamohseni, psychologist, who diagnosed the applicant with Major Depressive Disorder, Single Episode, Somatic Symptom Disorder with predominant pain and Specific Phobia, situational type. In contrast, the respondent's psychological IE assessor Dr. Marjan Saghatoleslami found that the applicant did not meet the DSM-V diagnostic threshold for any mental health disorder and did not sustain a psychological impairment as a result of the accident.

[15] When comparing the two psychological assessment reports, I prefer the IE report of Dr. Saghatoleslami. I agree with the respondent that when rendering her opinion, Dr. Saghatoleslami reviewed the fulsome medical record, including the CNRs of the applicant's family physician. In contrast, the applicant's assessor Dr. Aghamohseni did not appear to review any additional documentation, and as such, relied heavily on the applicant's self-reports. Dr. Aghamohseni's report also did not specify whether interpretation services were provided during the assessment, unlike the respondent's assessment report which clarified that an Arabic interpreter was used.

[16] I also note the respondent's argument that the s. 25 report indicated that the assessment was conducted by Dr. Aghamohseni, with "assistance" by Ms. Sara Gharibi, a registered psychotherapist (qualifying). However, it argues that no information was provided to identify who actually administered the psychological tests or diagnosed the applicant. The respondent relies on the Tribunal decision *Subramaniuam v. Aviva General Insurance*, 2022 CanLII 20126 (ONLAT) in support of its claim that such a report should be given less weight. Despite having the right of reply, the applicant did not provide any reply submissions to clarify Ms. Gharibi's role in the assessment.

[17] Finally, I find that Dr. Saghatoleslami's findings that the applicant did not meet the threshold for any DSM-V psychological diagnosis is consistent with the medical record. As noted, the CNRs of Dr. Alto do not indicate any ongoing psychological symptoms in the years post-accident, with the exception of the initial July 2, 2019 CNR entry. Outside of the s. 25 report, the applicant has not provided any objective evidence of a psychological impairment. As such, I do not

find that the applicant has met his burden to prove accident-related psychological impairments warranting removal from the MIG.

Treatment Plans

[18] The applicant sustained a minor injury as defined in the *Schedule* and is subject to the MIG and the $3,500.00 funding limit on treatment. The respondent has submitted correspondence indicating that the full MIG limit has been reached. Given that I have determined the applicant's impairments are subject to the MIG and the $3,500.00 funding limit on medical and rehabilitation benefits, an analysis of whether the OCF-18s in dispute are reasonable and necessary is unwarranted.

[19] However, as an alternative argument, the applicant submits that the OCF-18s in dispute are payable, as the respondent's notices did not contain sufficient medical reasons, were boilerplate and failed to discharge its statutory obligations under the *Schedule*. Although the applicant did not reference specific language from the notices, or cite a particular statutory reference, I infer that he is arguing that the notices were non-compliant with s. 44(5) or s. 38(8) of the *Schedule*. The respondent submits that all of its notices provided sufficient medical reasons and were statutorily compliant.

[20] I agree with the respondent. Upon review of the applicable notices I find that the respondent provided specific details about the applicant's medical condition and outlined why the respondent felt that the applicant's injuries were within the MIG. The notices were clear and sufficient enough to allow an unsophisticated person to make an informed decision as to whether to accept or reject the denial. As such, I do not agree with the applicant that the notices were inaccurate, unclear or not compliant with the *Schedule*.

The applicant has not established entitlement to NEBs

[21] 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, generally, focuses on a comparison of the applicant's pre- and post-accident activities.

[22] To establish his claim, the applicant relies on the CNRs of his family physician, the s. 25 report of Dr. Aghamohseni and the OCF-3 prepared by Dr. Tarulli. However, I agree with the respondent that the CNRs of Dr. Alto and the s. 25 report do not support a claim of the applicant's complete inability to lead a normal life. Dr. Alto's CNRs contain no reference to difficulties in engaging in pre-accident activities, let alone a complete inability. Further, they contain no reference to any accident-related complaints post-October 2019.

[23] While the s. 25 report of Dr. Aghamohseni notes some limitations in the applicant's completion of his pre-accident activities of daily living ("ADLs"), it does not find a complete inability to engage in ADLs. Dr. Aghamohseni reports that some of the applicant's household and personal care tasks have "become difficult" or "take longer". However, this does not rise to the level of being continuously prevented from engaging in substantially all of his pre-accident activities. The applicant does not direct me to any opinion from Dr. Aghamohseni that he suffers from a complete inability to lead a normal life.

[24] The only opinion provided to support the applicant's claim of a complete inability was provided by Dr. Tarulli in the OCF-3. However, I agree with the respondent that no details were provided in the OCF-3 as to the specific restrictions in the applicant's ADLs. Moreover, I note that an OCF-3 alone does not establish whether an applicant has sustained a complete inability to carry on a normal life. It is a form used to apply for a specified benefit and is not a comprehensive comparison of the applicant's pre and post accident function. Further, the anticipated duration of this inability was identified as being only 9-12 weeks.

[25] The applicant did not provide any details of his pre-accident activities or demonstrate how his participation in those activities has been limited as a result of the accident. There are no submissions on which activities were most important to him, how his pain prevents him from engaging in the activities he normally engaged in pre-accident or evidence of the frequency and time commitments of his pre-accident activities, as required by *Heath* and in many NEB cases at the Tribunal, such as *16-003141 v. Aviva Insurance Canada*, 2017 CanLII 46352 (ONLAT). In the absence of this information, it is difficult to compare the applicant's pre and post-accident capabilities with respect to the activities he ordinarily engaged in or valued.

[26] Moreover, the respondent's IE assessors Dr. Platnick, GP and Ms. Dhawan, occupational therapist, both opined that the applicant did not suffer a complete inability to carry on a normal life. As such, I find that the applicant has not met his

onus to prove on a balance of probabilities that he suffers a complete inability to carry on a normal life as result of the accident.

Award

[27] Section 10 of Regulation 664 provides that a special award may be granted if the respondent unreasonably withheld or delayed payments.

[28] In the matter at hand, the applicant is seeking an award, submitting that the respondent maintained denials by ignoring credible medical reasons and withheld payment to the applicant for reasonable and necessary treatment. No specific submissions or examples were provided by the applicant in support of this claim. Upon a review of the medical evidence, I found that the applicant did not establish that his accident-related impairments warranted removal from the MIG, that he was entitled to NEBs or the OCF-18s in dispute. As such, there is nothing in the evidence before me to suggest that the respondent behaved in an unreasonable manner. Accordingly, the applicant's request for an award is denied.

ORDER

[29] For the reasons outlined above, I find that:

i. The applicant's injuries fall within the MIG;

ii. The applicant is not entitled to the OCF-18s in dispute;

iii. The applicant is not entitled to a non-earner benefit for the period in dispute; and

iv. The respondent is not liable to pay an award under Regulation 664.

v. The application is dismissed.

Released: November 8, 2023

Ulana Pahuta
Adjudicator