



Citation: Tarbush v. Economical Mutual Insurance Company, 2023 ONLAT 22-002792/AABS

Licence Appeal Tribunal File Number: 22-002792/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:

Mohammed Tarbush

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: Sandra Driesel

APPEARANCES:

For the Applicant: Mohammed Tarbush, Applicant
Andrew Suboch, Counsel

For the Respondent: Krystle Brazier, Counsel
Jonathan Charland, Counsel

Interpreter: Wardia Ochana - (Arabic language)

Court Reporter: Corey Salazar

Heard by Videoconference: September 11, 2023

OVERVIEW

- [1] Mohammed Tarbush, the applicant, was involved in an automobile accident on November 22, 2020, 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 (“Economical”), and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues to be decided in the hearing 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 an income replacement benefit (“IRB”) in the amount of \$400.00 per week from November 22, 2020, to present and ongoing?
 - iii. Is the applicant entitled to \$3,405.09 for chiropractic services, proposed by LV Rehabilitation Clinic Inc. in a treatment plan/OCF-18 (“plan”) dated January 4, 2021, and denied on January 6, 2021?
 - iv. Is the applicant entitled to \$4,967.02 for chiropractic services, proposed by LV Rehabilitation Clinic Inc. in a plan dated November 8, 2021, and denied on November 11, 2021?
 - v. Is the applicant entitled to \$1,513.00 for other assistive devices, proposed by LV Rehabilitation Clinic Inc. in a plan dated December 22, 2021, and denied on December 23, 2021?
 - vi. Is the applicant entitled to \$2,200.00 for an orthopaedic assessment, proposed by LV Rehabilitation Clinic Inc. in a plan dated January 5, 2022, and denied on January 6, 2022?
 - vii. Is the applicant entitled to \$2,379.22 for psychological assessment, proposed by Community Health and Counselling Services Inc. in a plan dated January 15, 2022, and denied on February 1, 2022?
 - viii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] I find that:

- i. The applicant has not met his onus to prove that his accident-related impairments warrant removal from the MIG.
- ii. I find the applicant is not entitled to the IRB from the date of loss to the 2-year (104 week) end date.
- iii. Having found the applicant is to remain within the limits of the MIG (at \$3,500.00) and, given that the applicant has exhausted those limits, he is not entitled to the treatment plans and assessments in dispute.
- iv. As no benefits are payable, the applicant is not entitled to interest.

ANALYSIS

Background

[4] On November 22, 2020, while employed as an Uber driver the applicant was involved in a single car accident on the 407 Highway (Ontario), with a client in the backseat. The applicant testified he lost control of his vehicle due to stormy conditions. He hit the center cement barrier, skidded and spun against it multiple times. He recalls wearing his seatbelt and that his airbags did not deploy. He states that no police or emergency services attended the accident site, and he was able to continue driving so he dropped his Uber client at their destination and after doing so, he had his car towed. He admits to seeing his doctor two days after the accident and was sent for imaging that found he did not have any fractures.

The Minor Injury Guideline (“MIG”)

[5] I find the applicant sustained minor injuries as a result of the accident that are treatable within the MIG.

[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] If an insurer, as in this case, has deemed the applicant's injuries to be minor in nature, the responsibility is on the applicant to establish that the injuries are not minor and that therefore, the MIG does not apply. The Tribunal has also determined that chronic pain with functional impairment or a psychological impairment may warrant removal from the MIG.
- [8] The parties agree that the applicant initially suffered soft tissue injuries in the accident that were determined by the insurer to be treatable within the MIG limits. However, the applicant now submits his physical injuries have not healed through treatment available through the MIG limits and that he sustained additional, psychological impairment because of the accident. He argues he should be removed from within the MIG to seek further treatment that is necessary for him to return to his pre-accident activities of daily living and his pre-accident employment.
- [9] The respondent submits the applicant's self-reporting to various assessors related to both his accident-related injuries and his post accident functionality has been unreliable and inconsistent. It submits this is evidenced by the assessment reports in evidence, the applicant's own testimony that revealed contradictions, and surveillance video. It argues that the applicant is relying on assessments that are flawed because they merely rely on the applicant's reporting without the support of adequate medical testing. It submits the applicant has failed to meet his onus to prove entitlement to any benefits being claimed within this application.
- [10] I do consider the surveillance footage of the applicant between July 14, 2022, and December 15, 2022, is only a snapshot in time and is not necessarily representative of all of the applicant's day-to-day function. However, I find it does contradict the applicant's recent testimony regarding his ability to drive, lift or carry, or to return to his pre-accident employment. The applicant was videoed while he was delivering groceries, pumping gas, driving, lifting, etc. In addition, while viewing the videos the applicant was vague or guarded in his explanation of what he was doing or why. The video served to bring to light some of the inconsistencies or omissions in his self reporting, and I agree with the respondent that I cannot give much weight to the opinion of any assessor who relied solely on the applicant's subjective reporting to formulate an opinion.
- [11] The applicant submits that post-accident, he experiences ongoing symptoms of headaches, back and neck pain. In addition, he submits he has developed psychological impairments because of the accident that include memory loss and anxiety. He says since the accident, he is unable to be intimate with his wife, he

is often anxious and nervous and easily irritated which has affected his life with his wife, his children and his friends. He claims he requires medical treatment outside of the MIG to recover from the physical injuries that have not healed through treatment available within the MIG limits and psychological impairments he now suffers.

The applicant sustained minor physical injuries

- [12] I find that the applicant has sustained predominantly minor physical injuries as defined in the *Schedule* and the applicant has not met the burden of proving that his accident-related physical impairments require treatment beyond the MIG.
- [13] The applicant completed an OCF-1, Application for Accident Benefits on December 9, 2020, stating his injuries were to his neck, back, left knee and shoulder and that he was experiencing headaches and was scared to drive.
- [14] On December 28, 2020, following an examination of the applicant, Ushma Patel, Chiropractor, completed an OCF-3 Disability Certificate citing the applicant was unable to return to work because of pain to his neck, back, left shoulder and knee, that caused him to have problems driving, bending lifting and carrying. The form also shows the applicant is sensitive to light, has nightmares, sleep stress and is nervous driving. The chiropractor opined it would take approximately 9-12 weeks for the applicant to reach recovery for the injuries he sustained. The chiropractor is not qualified to diagnose non-physical injuries.
- [15] Regarding the status of his physical injuries, the applicant relies on an orthopaedic examination report by Dr. T. Getahun, Orthopaedic Surgeon. His virtual assessment was conducted January 7, 2022. At this time the applicant states that his back and neck pain are aggravated by prolonged sitting and standing. The doctor reports the applicant demonstrated painful restricted range of motion of the cervical spine, and he was complaining of back pain with attempts at movement. This doctor provides his opinion that the applicant's injuries do not fall within the MIG because his injuries have not resolved within the expected time course for uncomplicated soft tissue injuries. The doctor forms this opinion without reference to any medical testing of his own or to any existing documentation. I am not persuaded by his opinions because he fails to explain how he arrived at these assumptions as there is no comparative analysis showing exactly what injuries existed at the time of his assessment and how, if at all, do they compare with any injuries previously diagnosed as accident related. His opinion is seemingly based only on the self-reporting of the applicant and assumptions that are not supported by reference to other medical documents.

- [16] Dr. Getahun does not comment on the applicant's self-reporting to both Dr. Getsos and Dr. Walters of activity that might speak to different functional abilities than those he reported to Dr. Getahun. For example, the applicant admits to leaving the province shortly after the accident, to travel to Alberta, then British Columbia before he returned to Ontario on November 1, 2021. Dr. Getahun failed to address this extensive travel, especially how the applicant could physically cope with his reported restrictions due to pain, or if he required or sought medical attention during this period of time for any reported physical impairment. More importantly, Dr. Getahun does not comment on how the applicant's ability to travel might compare with his inability to return to his pre-accident functioning as diagnosed by the doctor. This is an example of the respondent's opinion that the applicant has not been consistent in his reporting to all assessors.
- [17] I find the reports of Dr. Getsos and Dr. Walters that were provided by the respondent to be persuasive because they included actual physical testing of the applicant. Dr. Getsos reports that his testing was not conclusive because the applicant declined to complete certain tests while exerting a poor and limited effort for others. Dr. Walters concludes from testing that there is no limitation or restrictions that prevent the applicant from returning to work and/or reaching full recovery from his accident-related injuries within the MIG.
- [18] Upon review of the evidence and submissions, I find that the applicant has sustained predominantly minor physical injuries as defined in the *Schedule*, and the applicant has not met the burden of proving that his accident-related physical impairments require treatment beyond the MIG.

The applicant did not sustain a psychological impairment

- [19] I find that the applicant has failed to meet his onus to prove he suffers from a psychological impairment because of the accident.
- [20] Psychological injuries are not included in the minor injury definition, and a finding that the applicant sustained a psychological injury as a result of this accident would permit him to seek treatment outside of the MIG and beyond the \$3,500.00 funding limit imposed by the MIG.
- [21] The applicant claims that because of the accident he now suffers from driving anxiety and that he has developed other psychological impairments such as irritable behaviour that is affecting his relationship with his family and friends, as well as his ability to sleep. He submits that his psychological injuries require treatment which should take him outside of the MIG.

- [22] The respondent argues that any evidence of psychological impairment advanced by the applicant is based on his self-reporting and is lacking in any validity testing. It submits the applicant has not met his onus to prove a psychological impairment related to the accident.
- [23] The applicant relies on a psychological report from an in-person assessment conducted on February 5, 2022 by Sathis Kumar Srinivasan and supervised by Dr. Erin D. Langis, Psychologist. Mr. Srinivasan, who completed the interview and psychometric testing, is a psychotherapist who is not able to diagnose clients and the respondent has challenged the reliability of this report because it is not clear if, or to what extent, Dr. Langis assessed the applicant. I accept that because Dr. Langis has signed the report that he has reviewed the report and is prepared to stand by its findings. This report concludes the applicant suffers a substantial inability to perform the essential tasks of his housekeeping and maintenance, as well as a total inability to carry on a normal life or to complete his pre-accident employment activity. The report recommends multiple psychotherapy treatments and a driving reintegration assessment “considering the duration and severity of Mr. Tarbush’s symptom”. This report does not show that the assessor(s) reviewed any clinical notes, records or reports related to the applicant’s condition prior to or after this assessment and therefore, it is lacking any explanation in how it determined any alleged psychological impairment is related to the accident. It seems the conclusions provided rely only on the self-reporting of the applicant.
- [24] I prefer the opinion of the insurer examination assessor Dr. Arnold Rubenstein, Psychologist, who assessed the applicant on October 27, 2022, as it was more consistent with other evidence and the applicant’s self-reporting. For instance, the applicant himself reports to this assessor that he has a fear of driving, but he also reports to have started driving with “Lyft” (a driving service similar to “Uber”) in approximately July or August of 2022. The applicant also tells the assessor that he does not require mental health counseling because he is experiencing mainly back issues.
- [25] Dr. Rubenstein reports he finds the applicant’s test results to be atypical, a reflection of symptom magnification and that the applicant “endorsed a high rate of symptoms rarely found in individuals with bona fide neurological disorders.” The assessor goes as far as saying the applicant’s symptoms are both illogical and bizarre and rarely reported by actual psychiatric patients. This assessor submits the testing of the applicant precludes the ability to diagnosis any accident-related psychological impairment as he doubts the veracity of the applicant’s responses.

- [26] I agree with the respondent that the applicant has failed to meet his onus to prove he suffers from a psychological impairment because of the accident. I find no compelling evidence he requires psychological intervention as a result of the accident.
- [27] I conclude the applicant sustained minor injuries as a result of the accident that are treatable with the MIG.

Income Replacement Benefit (“IRB”)

Change to period of entitlement and quantum of the IRB in dispute:

- [28] During the hearing the applicant requested that issue number ‘ii’ above be revised to change the period in dispute and the quantum in dispute as follows:
- ii. Is the applicant entitled to an IRB in the amount of \$154.00 per week from November 22, 2020, to the 2-year (104 week) end date?
- [29] The applicant was originally arguing his entitlement to an IRB at \$400.00 per week, for the period of November 22, 2020, to date and ongoing, claiming the injuries he sustained in the accident created a substantial inability to perform the essential tasks of his employment during the period in dispute. Through testimony and surveillance evidence presented at the hearing, it was established that the applicant had returned to work at some time that was not established in any other evidence or reporting to the insurer, and that the applicant has been collecting ODSP for years prior to and for some time following the accident that has never been reported to the insurer. Because of these admissions, the applicant altered the issue in dispute to reflect the ODSP income and to stop the benefit at the 104-week period, to reflect an estimated time of the applicant’s return to work.

The applicant is not entitled to an IRB

- [30] I find for the reasons to follow that the applicant has not met his onus to demonstrate that he suffers a complete inability to perform the essential tasks of his pre-accident employment and therefore, he is not entitled to an IRB.
- [31] Entitlement to an IRB falls under s. 5(1)(i) of the *Schedule*: an IRB is payable if the insured was working at the time of the accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. This inquiry is divided into two steps: 1) what are the essential tasks of the insured’s pre-accident employment; and 2) is the insured

substantially unable, as a result of the accident, to perform those tasks? The onus to prove entitlement rests with applicant.

- [32] At the time of the accident the applicant reports that he was employed as an Uber driver. His responsibilities here included picking up and transporting passengers to various destinations. We see through video evidence that the job can also include picking up and delivering groceries, which can include lifting and carrying items. Although accounts of his employment with Uber state it was a part-time job, reports of the number of hours he worked are inconsistently reported as anywhere from 7-8 hours to 30 hours per week. He testified that as a result of his accident related impairments he cannot complete the essential tasks required of this job, chiefly because: he now has a fear of driving; his back pain is aggravated if he sits for too long (and a typical driving shift would be about 7-8 hours); he cannot concentrate properly to drive safely, and his neck injury restricts his ability to move his head around as required when driving.
- [33] The applicant also reports to be a 'tailor' and at the time of the accident he owned a sewing machine and was working from his home. He also states that he worked on a cash basis so there are no records related to this income. He merely states that he has not returned to this work, but he fails to provide any details of what tasks were involved in this work or how being in the accident affected his ability to continue doing this work.
- [34] The respondent argues that the applicant has failed to provide any convincing medical evidence to prove that he suffered a substantial inability to complete his employment tasks during the period in dispute. It submits that any testimony or evidence provided by the applicant is laden with inconsistent employment details which cannot be confirmed because of the applicant's failure to provide the reasonably required information to properly determine his entitlement to this benefit or, if necessary, assess the quantum of any entitlement.
- [35] I agree with the respondent that I have not been directed to any medical evidence to show that the applicant suffered any impairment as a result of the accident that would restrict him from completing any of his pre-accident employment tasks and we have evidence that he can and does complete tasks required of his driving job. The applicant failed to address the tasks related to his tailoring business, and there was no evidence presented to suggest he cannot do this type of work or reasons why he cannot.

Treatment Plans and Assessments in dispute

- [36] Having determined that the applicant sustained minor injuries that are treatable within the MIG and understanding that the MIG limit has been exhausted, an analysis of whether the treatment and assessment plans in dispute are reasonable and necessary is not required because they propose treatment that exceeds the \$3,500.00 funding limits of the MIG.

Interest

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

Award

- [38] 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. I find the applicant has not submitted evidence to establish that the respondent's conduct rises to a threshold that would warrant an award and as such, no award is payable.

ORDER

- [39] I find that the applicant sustained minor injuries as result of the accident that are treatable within the MIG and that the MIG limit has been exhausted.
- [40] I find the applicant has not met his onus to demonstrate that he is entitled to IRBs.
- [41] I find the applicant is not entitled to the treatment plans, assessment in dispute and as no benefits are owing, he is not entitled to interest.
- [42] The application is dismissed.

Released: November 1, 2023



Sandra Driesel
Adjudicator