Citation: Hemmings v. Nordic Insurance Company of Canada, 2023 ONLAT 21-012516/AABS

Licence Appeal Tribunal File Number: 21-012516/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:

Jerome Hemmings

Applicant

and

Nordic Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Marc Golding, Paralegal

For the Respondent: Joshua Edmunds, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Jerome Hemmings (the "applicant") was involved in an automobile accident on May 8, 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 Nordic 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 s. 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 Minor Injury Guideline limit? ("MIG")

2. Is the applicant entitled to non-earner benefits ("NEB") in the amount of $185.00 per week from June 6, 2019, to May 8, 2021?

3. Is the applicant entitled to the treatment plans/OCF-18 ("OCF-18") proposed by Downsview Healthcare Inc., as follows:

    (i) $2,000.00 for psychological services, in an OCF-18 submitted on August 28, 2019, and denied on November 29, 2019;

    (ii) $1,910.88 for chiropractic treatment, in an OCF-18 submitted on November 13, 2019, and denied on December 2, 2019;

    (iii) $2,000.00 for a chronic pain assessment, in an OCF-18 submitted on November 26, 2019, and denied on December 20, 2019;

    (iv) $3,335.98 for psychological services, in an OCF-18 submitted on January 21, 2020, and denied on February 5, 2020; and

    (v) $627.92 for psychological services, in an OCF-18 submitted on July 7, 2020, and denied on August 24, 2020.

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

RESULT

[3] The applicant has not demonstrated that removal from the MIG is warranted. The applicant's injuries are predominantly minor and therefore subject to treatment within the MIG limit.

[4] I find that the applicant is not entitled to NEB.

[5] The applicant is not entitled to the OCF-18s in dispute or interest.

PROCEDURAL ISSUE

The Updated Clinical Notes and Records of Dr. Ramji, dated October 19, 2022, and March 24, 2023, will be considered for the purposes of this hearing

[6] I admit the updated clinical notes and records of Dr. Ramji, dated October 19, 2022, and March 24, 2023 ("updated records") as evidence for this hearing for the reasons outlined below.

[7] In its submissions, the respondent requests that the updated records be excluded as evidence for this hearing. The respondent submits that these records were served on May 30, 2023, after the November 13, 2022, deadline set in the CCRO.

[8] The respondent further submits it is prejudiced in its ability to review the evidence and obtain a responding addendum report. As a remedy, the respondent relies on Rule 9.4 of the *Common Rules of Practice and Procedure (October 2017)* (the "*Common 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 *18-002569 v. Aviva Insurance Canada*, 2019 CanLII 22214 (ON LAT), a Tribunal decision that excluded late productions.

[9] The applicant in reply submits that the updated records were provided to the respondent directly on March 30, 2023, and that the respondent had three months to arrange and produce an addendum report, if one was required. Moreover, the applicant submits that the respondent could have filed a motion to extend the deadline for its submissions and obtained the responding addendum report.

[10] I find that the probative value of the updated records outweighs any alleged prejudice suffered by the respondent, and I will consider the evidence as part of the applicant's submissions for the hearing. While I agree with the respondent

that the applicant did not meet the production timeline set out in the CCRO, such medical evidence is relevant to the substantive issues in dispute. Under s. 15(1)(b) of the *Statutory Powers Procedure Act*, RSO 1990, c S.22, documents relevant to the issues in dispute are admissible as evidence. However, this delayed production will go to the weight to be given to the evidence. In addition, while Tribunal decisions, can be persuasive, I am not bound by them.

[11] I therefore dismiss the respondent's motion for an exclusion of the updated records.

ANALYSIS

The applicant has not established entitlement to NEB

[12] I find that the applicant has not met his burden to prove his entitlement to NEB.

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

[14] The applicant's submissions were completely silent with respect to why he would be entitled to NEB, nor did he point me to evidence that supports his entitlement to this claim.

[15] The respondent submits that the applicant did not address NEB in his submissions, and as such, he has not met his onus to demonstrate that he is entitled to NEB.

[16] The applicant had a further opportunity to address this in his reply submissions, but he chose not to do so.

[17] The applicant cannot ask the Tribunal to connect the dots and make his case. Doing so inappropriately places the Tribunal in the role of his advocate. It is up to the applicant to provide submissions on entitlement to NEB and make specific citations in the evidence and explain why it supports entitlement to NEB.

Consequently, I find that the applicant is not entitled to NEB for the period of June 6, 2019, to May 8, 2021.

The Minor Injury Guideline

[18] 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."

[19] 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.

[20] In all cases, the burden of proof lies with the applicant.

[21] The applicant submits he should be removed from the MIG on three grounds:

i. He has severe chronic pain;

ii. He has neuropathic symptomatology, and

iii. He has psychological impairments.

[22] The respondent submits that the applicant's impairments fall within the MIG. The respondent submits that at best, the applicant sustained uncomplicated soft tissue sprain/strain injuries. Further the respondent submits that the applicant has failed to meet his onus to establish that he should be removed from the MIG on the basis of chronic pain, and psychological impairments.

The applicant is not removed from the MIG due to chronic pain

[23] I find that the applicant has not met his evidentiary onus to demonstrate that he suffers from a chronic pain condition, that would warrant removal from the MIG.

[24] The applicant submits that following the accident, he has chronic back pain and right knee pain. As such, the applicant submits he was unable to resume his pre-

accident part-time employment as a private investigator, and that he is not working in the same capacity with his full-time occupation. To this end, he relies on the clinical notes and records of Dr. Ramji and Dr. Sangha, and on an MRI of his lumbar spine, dated June 16, 2021.

[25] The respondent submits that the applicant has sustained soft tissue injuries as a result of the accident, and he returned to his full-time employment as a private investigator shortly following the accident. To this end, the respondent relies on the s. 44 report completed by Dr. Sandhu, occupational medicine physician, dated July 12, 2019.

[26] I find that the applicant has not met his onus of establishing pain of the duration, severity and functionally disabling extent necessary to remove him from the MIG.

[27] I find that the medical evidence of the applicant's family physician, Dr. Ramji, does not support the applicant's position that he has chronic back pain or right knee pain that resulted in losing his pre-accident part time employment or functional impairments to his current occupation. In the four years post-accident, the applicant attended his family physician's office on seven occasions for back pain and right knee pain. The clinical notes and records of Dr. Ramji do not indicate that chronic pain or a chronic pain diagnosis was discussed. Moreover, Dr. Ramji has not opined that the applicant has functional impairments with his work or that he was unable to work at his pre-accident employment as a result of alleged chronic pain from this accident.

[28] The applicant has also not referred me to evidence that shows he has been prescribed Naproxen beyond the recommended duration or evidence of abuse or dependence. In fact, on December 14, 2022, Dr. Sangha in her record noted "intermittent Naproxen use". I acknowledge that the applicant met with Dr. Ramji on February 7, 2023, for a renewal of Naproxen, however there was no discussion of whether the applicant was dependant or abusing Naproxen.

[29] In addition, I acknowledge that on October 22, 2020, Dr. Ramji recommended an MRI of the lower back, which was ultimately completed on June 16, 2021, and revealed multilevel degenerative changes and reversal of the lumbar spine lordosis. The applicant has failed to establish the connection between the degenerative changes/reversal lumbar spine lordosis and the subject accident, as he has not referred to a medical opinion that establishes a connection between the degenerative changes/reversal lumbar spine lordosis and his alleged chronic pain.

[30] The clinical note and record of Dr. Sangha, dated December 14, 2022, does not support the applicant's position that he has chronic pain with a functional impairment from this accident for the following reasons.

[31] Firstly, Dr. Sangha conducted a physical examination, which was essentially unremarkable, albeit for mild facetogenic pain in rotation and extension. Secondly, Dr. Sangha did not diagnose the applicant with chronic pain, nor did she prescribe pain medication. She also noted that the applicant had returned to his occupation as a private investigator. Thirdly, Dr. Sangha did discuss the option of SI joint injections if the applicant's lower back pain did not improve. However, the applicant has not referred me to evidence that demonstrates his pain progressed and as a result, he underwent SI joint injections. In fact, the next visit following the consultation with Dr. Sangha was for a renewal of his prescription for Naproxen on February 7, 2023, and then on February 13, 2023, when the applicant advised Dr. Ramji that he slipped and fell and injured his arms. During that visit, there is no reference to the subject accident or any mention of back pain or right knee pain.

[32] I am also persuaded by the s. 44 report of Dr. Sandhu which noted that the applicant had returned to his pre-accident employment as a private investigator two days following the accident, and that at the time of the assessment, he was working the same hours and duties as pre-accident. Moreover, Dr. Sandhu conducted a physical examination which was essentially unremarkable, albeit with some self-reported limitation of the applicant's lumbar spine on forward flexion, however this was not supported by the objective findings.

[33] For the foregoing reasons, I find that the applicant has not met his evidentiary onus that he has accident-related chronic pain to warrant removal from the MIG.

The applicant has failed to demonstrate that he has neuropathic symptomatology which would warrant removal from the MIG

[34] I find that the applicant has failed to demonstrate on a balance of probabilities that he has neuropathic symptomatology from this accident that would warrant removal from the MIG.

[35] The applicant relies on the clinical note and record of Dr. Ramji, dated May 21, 2020, to support his proposition that he has neuropathic symptomatology, which warrants removal from the MIG.

[36] The respondent did not provide any submissions with respect to this ground for removal from the MIG.

[37] I disagree with the applicant for the following reasons. Firstly, Dr. Ramji did not diagnose the applicant with a neuropathic impairment. While the applicant self-reported to Dr. Ramji that he had paresthesia in his legs and was unable to hold his urine for prolonged periods of time, Dr. Ramji did not provide a medical opinion of whether this resulted from a neuropathic impairment, nor did he refer the applicant to a specialist. Secondly, Dr. Ramji did not conduct objective testing to confirm the applicant had paresthesia in his legs. Lastly, Dr. Ramji did not provide a medical opinion of whether the neuropathic symptomology is related to the accident in any way, as his record was silent with respect to the accident. Moreover, the applicant has not pointed me to other medical evidence that supports he has either a neuropathic impairment or symptomology as a result of the accident.

[38] Accordingly, I find that the applicant has not met his burden of proof to demonstrate that he sustained a neuropathic impairment, and he has failed to demonstrate his symptomology is linked to the accident. As such, I find that the applicant is not removed from the MIG on this basis.

The applicant has not established that he sustained psychological impairments that warrant removal from the MIG

[39] I find that the applicant has not provided sufficient evidence to demonstrate that he sustained a psychological impairment that would warrant removal from the MIG.

[40] A psychological impairment, if established, may fall outside the MIG, because the MIG only governs “minor injuries”, and the prescribed definition does not include accident-related psychological impairment.

[41] The applicant relies on a s. 25 psychological assessment, dated October 7, 2019, completed by Ms. Ilios, psychotherapist, and Dr. Brunshaw, psychologist to support his position that he sustained an Adjustment Disorder with Mixed Anxiety and Depressed Mood, that warrants removal from the MIG. The applicant also relies on an OCF-3, dated May 13, 2019.

[42] The respondent relies on the s. 44 report of Dr. Waiser, psychologist, dated December 15, 2020, to support its position that the applicant sustained subclinical emotional symptoms that did not warrant a psychological diagnosis.

[43] I find that the applicant has not met his burden of proof in establishing that he has a psychological impairment as a result of the accident for the following reasons.

[44] Firstly, the applicant has not referred me to any entries from Dr. Ramji's records that demonstrate he has complained of psychological symptoms following this accident. Nor did he refer to any entries from Dr. Ramji's records where he was diagnosed with a psychological impairment, referred for treatment or prescribed any medication for psychological conditions.

[45] Secondly, I place little weight on the OCF-3 completed by Dr. Pivtoran, where he diagnosed the applicant with behavior-acute stress reaction, and behavior-symptoms and signs involving an emotional state. In my view, diagnosing psychological conditions is outside of the scope of practice of a chiropractor.

[46] Lastly, I prefer the report of Dr. Waiser, over the report of Ms. Ilios and Dr. Brunshaw. Firstly, Dr. Waiser, directly met with the applicant, meanwhile Dr. Brunshaw's contribution to the report is unclear. Secondly, Dr. Waiser reviewed an extensive amount of medical documentation, including the clinical notes and records of Dr. Ramji, unlike Ms. Ilios and Dr. Brunshaw, who only reviewed the OCF-3 and OCF-18, dated July 11, 2019. Finally, in my view, Dr. Waiser's conclusion that the applicant sustained subclinical emotional symptoms that did not warrant a psychological diagnosis, is consistent with the clinical notes and records of Dr. Ramji.

[47] For these reasons, I find the applicant has not established he experienced an accident-related psychological impairment that warrants removal from the MIG.

MIG not exhausted/Treatment Plans

[48] The parties did not make any submissions regarding whether the MIG was exhausted. It is unclear how much is remaining under the MIG.

[49] The applicant did not provide any submissions on why the proposed treatment plans are reasonable or necessary or direct the Tribunal to any specific references to evidence that supports his entitlement to the treatment plan in dispute. The applicant must direct the adjudicator to the relevant evidence in support of his case and explicitly explain why he meets the test based on this evidence. He has failed to do so.

[50] As such, I find that the applicant has not met his burden of proof that the OCF-18s in dispute are reasonable and necessary. Accordingly, he is not entitled to interest.

ORDER

[51] I find that:

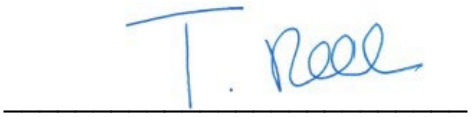
a. The applicant sustained a predominantly minor injury as a result of the subject accident.

b. The applicant is not entitled to NEB.

c. The applicant is not entitled to any of the OCF-18s in dispute or interest; and

d. The application is dismissed.

Released: December 13, 2023



Tanjoyt Deol
Adjudicator