



Citation: Jaroo v. Economical Mutual Insurance Company, 2023 ONLAT 21-007556/AABS

Licence Appeal Tribunal File Number: 21-007556/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:

Faez Jaroo

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: Stephanie Kepman

APPEARANCES:

For the Applicant: Maziar Mortezaei, Counsel

For the Respondent: Alexander Dos Reis, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Faez Jaroo (the “applicant”) was involved in an automobile accident on June 29, 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 Economical Mutual Insurance Company (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:
- 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”) limits? Note: The MIG limits have almost been exhausted at \$3,499.92, with \$0.08 remaining.
 - ii. Is the applicant entitled to an income replacement benefit (“IRB”) in the amount of \$203.45 per week from January 10, 2021, to date and ongoing?
 - iii. Is the applicant entitled to \$3,305.30 for physiotherapy, proposed by Health Pro Wellness in a treatment plan (“OCF-18”) submitted on November 28, 2019, and denied on December 5, 2019?
 - iv. 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, and denied on December 14, 2019?
 - v. Is the applicant entitled to \$3,305.30 for chiropractic services and massage therapy, proposed by Health Pro Wellness in an OCF-18 submitted on December 6, 2019, and denied on December 14, 2019?
 - vi. 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, and denied on March 31, 2021?
 - vii. 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?
 - viii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant's injuries are found to be within the MIG and he is not entitled to the requested OCF-18s.
- [4] The applicant is not entitled to the IRB.
- [5] The applicant is not entitled to interest or an award.

ANALYSIS

The applicant's injuries fall 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 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."
- [7] An insured may be removed from the MIG if they can establish that they have 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.
- [8] The applicant submits that his injuries fall outside the MIG because he suffers chronic pain and psychological injuries as a result of the accident. The respondent disagrees.
- [9] The applicant relies on the clinical notes and records ("CNRs") of Dr. Nadin Atto, his family doctor, and the corresponding CNRs from the other associates at the applicant's primary care clinic, the section 25 report of Fahimeh Aghamohseni, psychologist, dated March 3, 2021, the disability certificate ("OCF-3") of Dr. Rob Tarulli, chiropractor and the insurer's examinations ("IEs") of Dr. Eric Silver, physician, of January 14 and December 1, 2020, the IE of Amanda Rudzinski, registered kinesiologist, of November 18, 2020, and the IE of Dr. Rodney Day, psychologist, of November 2, 2021,
- [10] The respondent also relies on the CNRs of Dr. Atto and the other associates at the applicant's clinic, the IEs of Dr. Silver, Ms. Rudzinski, and Dr. Day, and the OCF-3 of Dr. Tarulli.
- [11] The applicant took issue with the IE of Dr. Day and submitted it as "invalid, inaccurate or incomplete", as the applicant did not complete the Personality

Assessment Inventory ("PAI") and the Pain Patient Profile ("P-3") components of the assessment. Dr. Day failed to explain the reasoning for this. The applicant submits that Dr. Day's IE should be given little to no weight.

- [12] The respondent submitted that Dr. Day's findings should be given full consideration, as the applicant told the doctor: "he does not require psychological treatment and was surprised that this was recommended for him." The applicant also told the doctor that he provided all his information to the doctor.
- [13] I agree that Dr. Day's IE will be afforded full weight. As noted by the respondent, the applicant did not raise any authority or case law to support his position that Dr. Day's findings should be afforded little to no weight. I also agree with the respondent's argument that the applicant did not explain the prejudice that was potentially caused by allowing this report into evidence.
- [14] I also note concerning Dr. Day's administration of the PAI, Dr. Day wrote: "Mr. Jaroo completed this measure very slowly and was ultimately unable to complete all of the test. Therefore, I was not able to score this measure." Concerning the P-3, Dr. Day also noted: "Mr. Jaroo inadvertently left the last page of this measure unanswered, which prevented me from scoring it." I note that this does provide a reasonable explanation as to why this information was not contained in the IE, contrary to the applicant's argument. Therefore, I did not find this position persuasive.
- [15] In terms of the applicant's psychological injuries, I find that the applicant has not shown that he suffers from psychological injuries as a result of the accident. As noted by the respondent, I found it odd that the report of Ms. Aghamohseni was not substantiated by contemporaneous medical records from the applicant's primary care clinic. I would have expected Ms. Aghamohseni's diagnoses to have been considered or noted by other medical professionals.
- [16] Moreover, it is difficult to reconcile the applicant's reports of issues made to his primary care physicians and Dr. Day, which are in stark contrast to those of Ms. Aghamohseni. This discrepancy was not explained by the applicant.
- [17] I also agreed with the respondent's argument that there was little explanation in Ms. Aghamohseni's report, despite the applicant's psychometric scores indicating he was experiencing mild anxiety and depression, she diagnosed him with adjustment disorder with mixed anxiety and depressed mood. I agree that this contradiction is not explained within the section 25 report.

- [18] The applicant also failed to explain why Ms. Aghamohseni's report did not rely on or reference the CNRs from the applicant's primary care clinic, which concerned me, as this information would have been valuable during the assessment. For these reasons, I put little weight on Ms. Aghamohseni's evidence, and I find that the applicant has not shown he suffered a psychological injury as a result of the accident.
- [19] In terms of the applicant's chronic pain, I find that the applicant has not shown that he suffers from this issue as a result of the accident. After reviewing the applicant's CNRs from his primary care clinic, I agree that he has complained of neck, back, left leg and knee pain for over a year and a half, which has resolved.
- [20] However, allegations of unresolved pain alone is not a diagnosis of chronic pain requiring removal from the MIG. Instead, the applicant must provide supportive arguments and evidence of this position, either via contemporaneous medical evidence and/or by addressing the criteria of the American Medical Association Guides to the Evaluation of Permanent Impairment, sixth edition ("AMA Guides"). An applicant must fulfil 3 of the 6 criteria to be considered to have chronic pain requiring removal from the MIG.
- [21] Though the AMA Guides are not binding on the Tribunal, they are a useful tool to evaluate an applicant's chronic pain when contemporary medical evidence to support an applicant's position is not available. This can be seen in *17-007825 v Aviva Insurance Canada*, 2018 CanLII 98282 (ON LAT). The 6 criteria are:
- i. Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;
 - ii. Excessive dependence on health care providers, spouse, or family;
 - iii. Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;
 - iv. Withdrawal from the social milieu, including work, recreation, or other social contracts;
 - v. Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs; and
 - vi. Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviours.

[22] I agree with the respondent's submissions that the applicant has not shown that he:

- i. Has abused or depended on prescription drugs, as seen in the applicant's CNRs of his primary care clinic. Though the applicant did receive a prescription for Diclofenac and Baclofen on January 22, 2020, these prescriptions were given for a limited time and only refilled more than a year later. This position is supported by the comments of the applicant during his IE with Dr. Day, where he revealed his pain had greatly reduced, and that he no longer needed prescriptions to address it.
- ii. Was overly dependent on his family, healthcare providers or spouse. As noted by the respondent, the applicant reported no changes in his relationship with his wife after his accident and described their status as "great" during his IE with Dr. Day. The applicant also did not show he was relying too much on the care of his doctors and healthcare team based on his primary care clinic's CNRs.
- iii. Had withdrawn from the social milieu, including work, recreation or other social contracts. This can be seen in the applicant's CNRs from his primary care providers and the IE of Dr. Day. The applicant told Dr. Day that he had not experienced any social withdrawal post-accident and was still maintaining relationships with his family. In terms of the applicant's work, it must be noted that the applicant was laid off 6 months before the accident and that he reported not looking for work due to high unemployment.
- iv. The applicant has not provided persuasive evidence that he has not restored his pre-injury function. Though the applicant reported experiencing pain for over a year to his primary care physicians, the applicant also reported to Dr. Day that he did not experience any major lifestyle changes beyond taking longer to get to sleep and not being able to exercise as intensely.
- v. The applicant has not shown psychosocial sequelae. Though the applicant was diagnosed with several psychological illnesses in his section 25 report, this report was not corroborated by contemporaneous medical evidence from the applicant's primary care clinic. Therefore, this was not persuasive.

- [23] The applicant has not shown that he fulfils 3 of the 6 criteria of the AMA Guides, nor provided persuasive medical evidence supporting his position of having chronic pain requiring removal from the MIG.
- [24] Therefore, his injuries are found to be within the MIG and there is less than a dollar within the MIG limits, I will not address the disputed OCF-18s.

Is the applicant entitled to an income replacement benefit in the amount of \$203.45 per week from January 10, 2021, to date and ongoing?

- [25] To receive payment for an IRB under s. 5(1) of the *Schedule*, the applicant must be employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffer a substantial inability to perform the essential tasks of that employment. The applicant must identify the essential tasks of their employment, which tasks they are unable to perform and to what extent they are unable to perform them. The applicant bears the burden of proving, on a balance of probabilities, that they meet the test.
- [26] In his submissions, the applicant clarified that he is seeking an IRB for the period of January 10, 2021, to November 1, 2021. Therefore, I will limit the applicant's claim to this period. Since the accident occurred on June 28, 2019, I must address the applicant's pre- and post-104 IRB eligibility.
- [27] The applicant submits he is entitled to a pre-104 IRB. The respondent disagrees.
- [28] The applicant relies on the previously noted evidence relied upon for his removal from the MIG to demonstrate that he suffers from a substantial inability to perform the essential tasks of his employment, as his chronic pain, cognitive, and psychological injuries prevent him from doing such.
- [29] The respondent relies on the IEs of Dr. Day, Ms. Rudzinski and Dr. Silver, the applicant's 2020 Notice of Assessment ("NOA"), and the OCF-3 of Dr. Tarulli. The respondent argues that the applicant returned to work sometime in early 2020 and has not provided evidence beyond his OCF-3 that he satisfies the pre-104 IRB test. The respondent also submits that even if the applicant is found to be entitled to an IRB, the quantum would be \$0.00 based on deductions in the *Schedule*.
- [30] I find that the applicant has not shown that he suffers a substantial inability to perform the essential tasks of his pre-accident employment. The parties agreed that at the time of the accident, the applicant was receiving employment

insurance (“EI”) benefits, as he had been laid off from his job as an auto glass technician.

- [31] I do agree that the applicant's doctor, Dr. Atto, diagnosed him with ongoing left shoulder, neck, lower back and possible tendonitis. However, after reviewing the CNRs of February 12 and March 12, 2021, Dr. Atto did not comment on the applicant's ability to work, despite the applicant submitting this argument.
- [32] I was not able to find any medical opinions that supported that the applicant was unable to assume the essential tasks of his employment, beyond the OCF-3 of Dr. Tarulli. I also note that Dr. Tarulli estimates the applicant's anticipated duration of recovery to be 9 to 12 weeks. The applicant did not provide an updated OCF-3 or further medical records to explain his ongoing period of disability. Without some sort of contemporaneous evidence or explanation for the information gaps, I did not find the OCF-3 persuasive that the applicant fulfilled the pre-104 IRB test.
- [33] Though I considered the respondent's arguments regarding the contradictions in the applicant's IEs with Dr. Day and Ms. Rudzinski, I did not find this argument persuasively showed that the applicant lied about when he returned to work. The simple fact that the applicant reported a “typical” day to Dr. Day and did not specifically mention that at the time of his IE that he had returned to work the previous day does not persuasively show that the applicant was lying. Instead, it is possible that he simply omitted this qualifier. Therefore, I also did not find that the applicant's recounts to Ms. Rudzinski were untrustworthy, or that the applicant was not credible.
- [34] I also agree that the report from Ms. Aghamohseni did not comment on the applicant and the pre-104 IRB test. Therefore, I afforded it little weight.
- [35] Instead, I preferred the opinion of Dr. Silver, who found that the applicant did not satisfy the pre-104 test and provided an easy-to-follow explanation for his findings. I found this report useful and persuasive, given that it was one of the few medical documents that commented on the legal test.
- [36] Since the applicant has not shown that he suffers a substantial inability to complete the essential tasks of his employment, he is not entitled to the pre-104 IRB.
- [37] To receive payment for a post-104-week IRB under s. 6 of the *Schedule*, the applicant must demonstrate on a balance of probabilities that they suffer from a

complete inability to engage in any employment or self-employment for which they are reasonably suited by education, training, or experience.

- [38] The applicant submitted he is entitled to the post-104 IRB. The respondent disagreed. The parties relied on the same evidence for the post-104 IRB as was used for the pre-104 IRB.
- [39] I find that the applicant is not entitled to the post-104 IRB. I was not presented with convincing evidence regarding the applicant's abilities, and if he suffered a complete inability to engage in any employment or self-employment for which he is reasonably suited.
- [40] As discussed in the pre-104 IRB section, I also did not find the OCF-3 and the applicant's CNRs from his primary care clinic persuasive that he was not able to engage in any kind of employment. I would have expected the applicant to provide an OCF-3 that spoke to the disputed period and provided contemporaneous medical evidence that spoke to the applicant's abilities.
- [41] Without this information, the applicant has not met his evidentiary burden under the *Schedule* and is not entitled to the post-104 IRB.

Interest

- [42] Interest applies on the payment of any overdue benefits under s. 51 of the *Schedule*. Since the applicant is not entitled to the disputed benefits, no interest is owed.

Award

- [43] The applicant sought an award under s. 10 of *Reg. 664*. Under s. 10, the Tribunal may grant an award of up to 50 percent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. As the applicant is not entitled to any of the disputed benefits, he is also not entitled to an award.

ORDER

- [44] The applicant's injuries are found to be within the MIG.
- [45] The applicant is not entitled to the disputed OCF-18s.

[46] The applicant is not entitled to the IRB for the disputed period.

[47] The applicant is not entitled to interest or an award.

Released: December 20, 2023



Stephanie Kepman
Adjudicator