Citation: Karwi v. Aviva Insurance Canada, 2023 ONLAT 21-015123/AABS

Licence Appeal Tribunal File Number: 21-015123/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:

Awatif Karwi

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

VICE-CHAIR: **Jeffery Campbell**

APPEARANCES:

For the Applicant: Camille Narine-Ramrattan, Paralegal

For the Respondent: Lauren C. Kolerek, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Awatif Karwi, the applicant, was involved in motor vehicle accidents on November 9, 2020 and November 10, 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, Aviva Insurance Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant applied to the Tribunal regarding the denial of benefits from both accidents. At a case conference dated September 15, 2022, the adjudicator ordered that the application arising from the November 9, 2020 accident (21-015131/AABS) (MVA 1) be adjoined to application arising from the November 10, 2020 accident (21-05123/AABS) (MVA 2).

PROCEDURAL ISSUE

[3] The Minor Injury Guideline ("MIG") was not listed as an issue in dispute in the Case Conference Report and Order of October 13, 2022 ("CCRO").

[4] On consent, the applicant requested via email that the Tribunal amend the CCRO to include the MIG as an issue in dispute, and submitted the issue was discussed at the case conference. The case conference adjudicator declined to amend the CCRO. The adjudicator stated that the issue was not included in the applications and that neither party had asked at the case conference that the issue be added.

[5] Notwithstanding the decision of the case conference adjudicator, both parties included the issue of the MIG in their submissions for this hearing as an issue to be considered.

[6] I find that there would be no prejudice to the respondent in adding the issue of the MIG in this hearing. Indeed, it was the respondent's assumption that that issue was in dispute throughout the course of this application and made submissions accordingly. I also find that there would be prejudice to the appellant in not adding the MIG as an issue. The appellant would lose the opportunity to dispute any medical/rehabilitation issues if there were no opportunity to dispute the applicant's present status of being inside of the MIG.

[7] As indicated in the CCRO, the orders made at the case conference are subject to my discretion as the hearing adjudicator. Accordingly, the issue of whether or not

the applicant's injuries are predominately minor will be heard as an issue at this hearing.

ISSUES

[8] The issue(s) in dispute is/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 limit and in the Minor Injury Guideline?

2. Is the applicant entitled to a non-earner benefit of $185.00 per week from December 29, 2020 to November 12, 2022?

3. Is the applicant entitled to the physiotherapy services proposed by Midland Wellness Centre, as follows:

   (i) $3,122.48 in a treatment plan submitted July 13, 2021, and denied on July 20, 2021;

   (ii) $2,797.76 in a treatment plan submitted on September 7, 2021, and denied on September 21, 2021;

   (iii) $2,860.58 in a treatment plan submitted on March 8, 2021, and denied that same day;

   (iv) $2,473.04 in a treatment plan submitted on November 11, 2021, and denied on November 4, 2021; and

   (v) $493.90 ($1,300.00 less $675.60 approved) in a treatment plan submitted on February 5, 2021, and denied on February 17, 2021?

RESULT

[9] The applicant's injuries do not warrant removal from the MIG;

[10] The applicant is not entitled to a non-earner benefit ("NEB");

[11] The applicant is not entitled to the treatment plans in dispute.

ANALYSIS

Removal from the MIG

[12] I find that the applicant has not met her onus of proving that her accident-related impairments warrant removal from the MIG. 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."

[13] 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.

[14] The applicant claims that she sustained soft tissue injuries as a result of the motor vehicle accidents, including injuries to her cervical and lumbar spine and is experiencing headaches, fatigue, dizziness, sleep disorders and nightmares. She also claims injuries to her right knee.

[15] The respondent submits that the applicant has not met her burden, as she sustained minor injuries as a result of the accident. It submits that the injuries sustained are found within the definition of the MIG.

[16] I agree with the respondent that the applicant's injuries are minor. The Disability Certificate/OCF-3 ("OCF-3"), dated November 18, 2020, completed by physiotherapist, Sreeja Gimmy ("Ms. Gimmy") noted that the appellant's accident-related injuries were sprain and strain of her cervical, thoracic and lumbar spines, thorax shoulder joint, shoulder girdle and hip. Ms. Gimmy also noted headaches, nightmares, malaise, fatigue, dizziness, giddiness, nausea and vomiting.

[17] The clinical notes and records of the applicant's family doctor, Dr. Emad Guiruis reveal that the applicant complained of right knee pain on June 21, 2021. An X-ray of the right knee dated July 16, 2022 revealed minor quadriceps enthesopathy. An ultrasound of her right knee of the same date revealed mild quadriceps enthesopathy and chronic injury to the medial collateral ligament

("MCL"). Dr. Guiruis advised the appellant to obtain an MRI of the right knee, but none was obtained.

[18] I find that none of the actual diagnoses listed in the OCF-3 are such that would warrant the applicant's removal from the MIG. Regarding the non-physical injuries listed, the respondent asserts that Ms. Gimmy is not qualified to diagnose psychological or neurological disorders. The appellant submits that Ms. Gimmy was not making a diagnosis of any psychological disorders, rather just noting them. Nevertheless, whether Ms. Gimmy was intending to diagnose or not, the noting of "headaches, nightmares, malaise, fatigue, dizziness, giddiness, nausea and vomiting" are not diagnoses, but, rather, a list of symptoms.

[19] Regarding the diagnosis of chronic injury to the right MCL, the respondent submits that the appellant did not report her right knee pain until June 21, 2021, and questions its causal link to the motor vehicle accidents. I do note, however, that the appellant did advise Dr. Guiruis that she has been experiencing the right knee pain since "MVA 2020". However, even if the right knee pain and the diagnosis of chronic injury to the right MCL is found to be causally connected to the motor vehicle accidents, the appellant is not claiming that she has sustained chronic pain and has not presented any evidence of any functional impairments that any chronic pain has produced.

[20] I find that the applicant's injuries are those that fall within the definition of the MIG.

Pre-existing Condition

[21] I find that the appellant does not have a pre-existing condition that would warrant her removal from the MIG.

[22] The applicant seeks to be removed from the MIG on the basis that she had pre-existing issues which would preclude her recovery if is she kept within the confines of the MIG. The applicant submits that she had pre-existing conditions of right-hand degenerative changes, deltoid pain and headaches and anxiety. In particular, the applicant asserts that the pre-existing condition of hypertension was aggravated by the two accidents.

[23] The respondent asserts that there is no evidence of a pre-existing medical condition warranting a MIG removal. I agree. In my view, the applicant has failed to point me to any compelling evidence to show how these pre-existing conditions preclude her recovery if she remains in the MIG. These pre-accident conditions are chronicled in the medical records. However, while the applicant

did produce medical documentation as to the pre-existing conditions, there was no medical evidence put forward with respect to how those conditions hinder her recovery if she is kept within the MIG.

Conclusion

[24] I find that the appellant has not met her burden to prove on a balance of probabilities that her accident-related injuries warrant removal from the MIG.

Entitlement to Treatment

[25] Given that the applicant has not proven that she is out of the MIG, I need not consider whether she is entitled to the disputed treatment plans as she has exhausted the $3,500.00 limit. **Non-Earner Benefits**

[26] I find that the applicant is not entitled to a NEB in the amount of $185.00 per week from December 29, 2020 to November 10, 2022.

[27] Section 12(1) of the *Schedule* 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.

[28] The applicant submits that she is entitled to NEB and relies on the OCF-3, in which Ms. Gimmy noted that the applicant suffers a complete inability to carry on a normal life. She stated that the duration of the applicant's inability would be 9-12 weeks. The applicant also relies on the records of Dr. Guiruis which state that the applicant was experiencing knee pain.

[29] The respondent submits that while the applicant may have symptoms of injuries that she sustained, she has not withdrawn from social activities or recreation and has not altered her activities of daily living or function after the accidents.

[30] With respect to the applicant's post-accident activities, she submits that she no longer travels in a private vehicle and chooses to take public transit to move around. The applicant also submits that she occasionally requires assistance due to a limitation in her range of motion. Also, prior to the motor vehicle accidents,

the applicant was on Ontario Works and was enrolled in an English as a Second Language program. It is unclear if the applicant is continuing in this program. No other evidence was led regarding the applicant's pre and post motor vehicle accident social activities or activities of daily living.

[31] In my view, the applicant has not provided compelling evidence to support her claim of a NEB. The applicant submits that, post-accident, she chooses to take public transit over a private vehicle and that she occasionally requires assistance due to a limited range of motion. These self-reported changes in behaviour fall short of meeting the complete inability test pursuant to s.12(1). The respondent submits that while the applicant may have symptoms (as before symptoms?) of injuries that she sustained, she has not withdrawn from social activities or recreation and has not altered her activities of daily living or function. Based on the evidence before me, I agree with the respondent.

[32] I find that the applicant has failed to meet her onus to prove on a balance of probabilities that she is entitled to a NEB.

ORDER

[33] This application is dismissed and I order that:

i. The applicant's injuries are predominately minor and therefore subject to the treatment within the $3,500.00 limit of the MIG;

ii. The applicant is not entitled to a NEB of $185.00 per week from December 29, 2020 to November 10, 2022;

iii. The applicant is not entitled to the treatment plans in dispute.

Released: December 1, 2023

Jeffery Campbell
Vice-Chair