Citation: Zhang v. Security National Insurance Company, 2024 ONLAT 21-015571/AABS

Licence Appeal Tribunal File Number: 21-015571/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:

Feng Juan Zhang

Applicant

and

Security National Insurance Company

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Ryan Olson, Paralegal

For the Respondent: Nathan Fabiano, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Feng Juan Zhang (the "applicant") was involved in an automobile accident on July 7, 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 Security National 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. Is the applicant entitled to a non-earner benefit ("NEB") of $185.00 per week from August 5, 2019, to July 1, 2020?

ii. Is the applicant entitled to the remaining balance of $480.00 for transportation services, proposed by Total Recovery Rehab Centre in a treatment plan/OCF-18 ("OCF-18") submitted October 20, 2020, and denied on October 29, 2020?

iii. Is the applicant entitled to the remaining balance of $480.00 for transportation services, proposed by Total Recovery Rehab Centre in an OCF-18 submitted January 2, 2021, and denied on January 28, 2021?

iv. Is the applicant entitled to $4,540.08 for chiropractic services, proposed by Total Recovery Rehab Centre in an OCF-18 submitted February 20, 2021, and denied on April 22, 2021?

v. Is the applicant entitled to $10,074.00 for lost educational expenses, submitted on a claim form ("OCF-6") dated March 9, 2020?

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

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?

RESULT

[3] I find that:

i. The applicant is not entitled to NEB.

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

iii. The applicant is not entitled to $10,074.00 for lost educational expenses.

iv. The respondent is not liable to pay an award.

ANALYSIS

The applicant is not entitled to NEB for the time period of August 5, 2019 to July 1, 2020

[4] I find that the applicant has not satisfied her onus to prove that she suffers from a complete inability to carry on a normal life for the time period of August 5, 2019 to July 1, 2020.

[5] 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 at para. 50, which focuses on a comparison of the applicant's pre-and post-accident activities.

[6] The applicant submits that she sustained injuries to her: neck, shoulders, back/lower back, as well as psychological injuries that affect her day-to-day activities. To support her position, the applicant relies on a Disability Certificate ("OCF-3") dated March 13, 2020, s. 44 psychological examination report by Dr. Daniel Cohen, psychologist, dated August 24, 2020, and a s. 44 physiatry examination report by Dr. Yong-Kyong Ko, physiatrist, dated August 24, 2020.

[7] The respondent submits that it is clear from the evidence that the applicant does not meet the test for NEB. It further submits that in the 104 weeks after the accident, the applicant started a physical job as a cashier, increased her course load at the University of Toronto, continued her hobby of building Lego, remained completely independent in her personal care, and continued all her household activities. To this end, it relies on the section 44 reports of: Dr. Ko, Dr. Cohen, Dr. Andrew Holland, chiropractor (dated April 21, 2021), Mr. Atul Kaul, occupational therapist ("OT") (dated August 24, 2020), the clinical notes and records of the

applicant's family physician, Dr. Suliman Furmli and the file from University of Toronto.

[8] The applicant has not provided submissions or tendered evidence of her pre-accident activities of daily living, or more crucially, demonstrated how her engagement in these activities has changed as a result of the accident. Moreover, in her submissions, the applicant did not identify the activities she values or provide evidence of the frequency and time commitments of her pre-accident activities as required by *Heath*.

[9] In the absence of this information, it is difficult to compare her pre- and post-accident capabilities with respect to the activities she ordinarily engaged in or valued. I acknowledge that the applicant submits that her injuries impair her ability to complete her household chores and carry out aspects of her daily living. The applicant also relies on her self-reporting to Dr. Cohen and Dr. Ko that she could only tolerate walking for 5 minutes, could not read for more than an hour or so due to neck pain, was not socializing as much, not hiking/camping, no longer playing board games, and that she was taking a reduced course load at the University of Toronto.

[10] However, in my view, this vague self-reporting does not meet the stringent NEB test, as her self-described functional deficits do not rise to the level that they continuously prevent her from engaging in substantially all of her pre-accident activities. Moreover, the applicant reported that she was not hiking or camping due to financial reasons and not because of a physical or psychological inability to do so.

[11] Contrary to the applicant's self-reporting, she was already on a reduced course load prior to the accident, as indicated in the file provided by the University of Toronto. Moreover, the file shows that the applicant was not the strongest student, even prior to the accident.

[12] For example, the last time prior to the accident, she took a full course load was in Fall of 2017 where she received two grades of "credit", as well as a C plus, C, and a D. Thereafter, she resumed her studies with a reduced course load of three/four courses in her 2018 Fall and 2018/2019 Winter semesters.

[13] Following the accident, for the first time since 2017, the applicant enrolled in a full course load in her 2019 Fall term. Subsequently, the applicant continued to resume her studies with a courseload of three/four courses (the same amount as pre-accident) per semester.

[14] While I acknowledge that the applicant's school records show that the applicant failed two courses in the 2019 Fall term, aside from her self-reporting, the applicant has not referred me to a medical opinion that connects the dots between her grades and the subject accident. In any event, the applicant resumed her studies and was able to manage the same course load as pre-accident, which in my view demonstrates that she is not continuously prevented from completing her studies, as the disability has to be uninterrupted, as outlined in *Heath*.

[15] The applicant also does not direct me to a medical opinion from a treating physician that she suffers a complete inability to carry on a normal life. Although the OCF-3 prepared by Mr. Ahmed Afifi, physiotherapist, identified such an inability, there is no outline, as is required in *Heath*, of the pre-accident activities performed by the applicant and how they are impacted by the injuries from this accident. As such, the OCF-3 is limited in its evidentiary value, and I place little weight on it. I also note that the clinical notes and records of Dr. Furmli, the applicant's family physician, did not note any changes to the applicant's functionality following the accident, aside from the applicant self-reporting once that she found it hard to drive.

[16] The respondent's insurer examinations conducted by Dr. Cohen, Dr. Ko, Dr. Holland, and Mr. Kaul found that the applicant did not suffer a complete inability to carry on a normal life as a result of the accident. The applicant advised the assessors that following the accident, she is independent with her personal care tasks, housekeeping tasks, resumed her studies, started working one year after the accident in a cashier position, and continued with her hobby of making Legos.

[17] Lastly, I take note that the applicant made vague submissions that the respondent improperly withheld payments for her NEB entitlement. However, the applicant did not provide submissions on how the respondent "improperly withheld" NEB payments, nor did she refer me to a section of the *Schedule* that the respondent was non-compliant with. Moreover, the applicant did not direct me to evidence to support her submissions. It is well settled that submissions do not constitute evidence. Accordingly, the applicant has not met her onus to demonstrate that the respondent improperly withheld NEB payments.

[18] In conclusion, the applicant is not entitled to NEB for the time period claimed, as she did not demonstrate a complete inability to carry on a normal life as a result of the subject accident.

Treatment Plans

[19] To receive payment for a treatment and assessment plan pursuant to sections 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

The applicant is not entitled to the balance of $480.00 for transportation services, as indicated in the OCF-18s submitted on October 20, 2020, and January 2, 2021

[20] I find that the applicant has not met her evidentiary onus to establish that the remaining balance for transportation services are payable, as she provided no submissions, nor did she direct me to evidence to support entitlement.

[21] On October 29, 2020, the respondent partially approved the OCF-18 in the amount of $4,229.56 for physiotherapy services, and only denied the proposed transportation services in the amount of $480.00. On January 28, 2021, the respondent partially approved the OCF-18 in the amount of $4,160.08 for chiropractic services, except for the proposed transportation services in the amount of $480.00.

[22] Section 3(1)(a) provides that “authorized expenses” are calculated by applying the rates set out in the Transportation Expenses Guidelines published by FSCO in The Ontario Gazette. Section 3(1)(b) further provides that unless the insured is catastrophically impaired, transportation expenses are only payable after the first 50 kilometres of a trip.

[23] Problematically, despite the remaining balance for transportation services being a live issue in dispute, the applicant offered no submissions to demonstrate why she should be entitled to the remaining balance. Instead, the applicant submitted that she reported improvement with chiropractic therapy, which is unhelpful, as the respondent has already approved chiropractic services and physiotherapy services.

[24] The respondent submits that despite these transportation services being an issue in dispute, the applicant made no mention of these issues. Its position is that the transportation costs are not payable pursuant to s. 3(1)(b) of the *Schedule*, as the distance between the applicant’s home and the treatment facility is 7.8 kilometres.

[25] The applicant did not provide any initial or reply submissions on why she would be entitled to transportation expenses for the first 50 kilometres. There is no evidence before me that the applicant has sustained a catastrophic impairment as a result of the accident, thus the applicant has not met her evidentiary onus to demonstrate entitlement to the remaining balance for transportation services.

[26] Accordingly, as the applicant provided no submissions, nor did she tender evidence, she has failed to establish entitlement to the proposed transportation services.

The applicant is not entitled to the OCF-18 in the amount of $4,540.08 for chiropractic services, proposed in an OCF-18 submitted on February 20, 2021

[27] I find that the applicant has failed to establish that the OCF-18 for chiropractic services is reasonable or necessary or that it is payable pursuant to s. 38(11) of the *Schedule*.

[28] Sections 38(8) and (11) of the *Schedule* set out strict notice requirements for insurers responding to treatment plans and specific consequences if they fail to comply. Section 38(8) requires an insurer to inform an insured person of the medical and other reasons why it considered the goods and services not to be reasonable and necessary if it denies a treatment plan within ten business days. Pursuant to s. 38(11), if an insurer fails to comply with any of these requirements, it is prohibited from taking the position that the MIG applies and must pay for any incurred treatment and expenses until such time that it gives notice that complies with s. 38(8) of the *Schedule*.

[29] The applicant submits that the chiropractic treatment provides improvement and that the respondent's explanation of benefits ("EOB") dated February 24, 2021, was non-compliant with s. 38(8) of the *Schedule*, as the respondent did not advise which documentation it relied on in making its determination, nor did it reference her injuries.

[30] In response, the respondent submits that the applicant has not met her onus to establish entitlement to the OCF-18, as she has not demonstrated that the proposed services are reasonable and necessary. The respondent also submits that its EOB, dated February 24, 2021, was not improper and that it provided another EOB on April 22, 2021, following the receipt of the insurer's examination report of Dr. Holland.

[31] On February 24, 2021, the respondent sent an EOB to the applicant which advised that the proposed OCF-18 was being denied as "it has been more than 1 year with same treatment provided with no resolution to your imprudent, as such, we require a 2nd opinion if ongoing treatment is required." The respondent also advised that it wanted to arrange s. 44 insurer's examinations to determine whether the proposed services were reasonable and necessary.

[32] I find that the EOB, dated February 24, 2021, does not comply with the requirement pursuant to s. 38(8) of the *Schedule*, as it failed to provide adequate medical reasons to deny the disputed OCF-18. The reasons provided in the EOB are insufficient to satisfy the respondent's obligation under s. 38(8) of the *Schedule* as no specific details about the applicant's diagnosis, prognosis, or the details of the treatment plan were provided.

[33] Indeed, the respondent provided no explanation in its EOB of what it meant by "imprudent", nor did it identify what information it reviewed in making its determination. In my view, the respondent's denial lacked clear and sufficient reasons to allow the applicant to make an informed decision to either accept or dispute the denial.

[34] However, the respondent cured its previously deficient notice in its subsequent EOB, dated April 22, 2021. Here, the EOB, included a copy of the s. 44 report completed by Dr. Holland, and advised the applicant that the OCF-18 was denied as she demonstrated full range of motion in the physical examination conducted and that there was no evidence of an ongoing accident-related impairment. In my opinion, this subsequent denial is a clear and unequivocal denial of the OCF-18 and provides more information to the applicant and refers to the medical evidence that it relied on in making its determination. As such, I find that the subsequent EOB, dated April 22, 2021, cured the deficiency of the previous EOB.

[35] The applicant has not led any evidence as to whether the OCF-18 in dispute was incurred during the period of non-compliance. I am bound by the Divisional Court decision in *Aviva General Insurance v. Catic*, 2022 ONSC 6000 ["*Catic"*]. In that case, the insurer provided a denial letter outside of the 10-day period under s. 38(8) of the *Schedule*, and the insured did not incur any expenses up to the date the denial letter was delivered. The Court found that s. 38(11)2 compels the insurer to pay for all items in the treatment plan, but only if they are incurred during the period of non-compliance, where any denial notice remains outstanding. The applicant has failed to provide evidence that the proposed OCF-18 was incurred before April 22, 2021. As such, the applicant has not met

her evidentiary onus to demonstrate that the OCF-18 is payable pursuant to s. 38(11) of the *Schedule.*

[36] Now turning to whether the proposed chiropractic services are reasonable and necessary, which I find that it is not. The applicant's submissions are devoid of how the treatment goals are reasonable, whether the goals will be met to a reasonable degree, and whether the overall cost of the goals is reasonable. In fact, other than submitting that she found improvement with the proposed services, she made no other submissions on why the proposed OCF-18 is reasonable and necessary. Where the applicant has not provided specific submissions to support the goals and costs of the treatment she seeks, it follows that she has fallen well short of meeting her burden of proof on this issue.

[37] The applicant has also not directed me to medical evidence, outside of the OCF-18, that the treatment was recommended by any of her treatment providers. It is well-settled that more than an OCF-18 is required to show that the proposed services are reasonable and necessary. In fact, there must be compelling contemporaneous medical evidence in support of the OCF-18.

[38] In this matter, I find that the applicant has not provided contemporaneous medical evidence in support of the OCF-18. The clinical notes and records of the applicant's family physician, Dr. Furmli, do not support that the proposed chiropractic services are reasonable and necessary, especially since the last accident-related visit was on March 15, 2020.

[39] I am also persuaded by the section 44 report of Dr. Holland. Dr. Holland noted that while the applicant had subjective pain complaints, she had full range of motion in her: cervical spine, shoulders, lumbar spine, and hip. Thus, Dr. Holland concluded that the proposed chiropractic services were not reasonable and necessary as the physical examination did not reveal an ongoing accident-related impairment warranting continued clinic-based therapy. The applicant has also not produced medical evidence to refute Dr. Holland's findings.

[40] For the foregoing reasons, I find that the applicant is not entitled to the proposed OCF-18, as she has not established on a balance of probabilities, that it is reasonable and necessary.

The applicant is not entitled to Lost Educational Expenses in the amount of $10,074.00

[41] I find that the applicant is not entitled to lost educational expenses in the amount of $10,074.00 as the tuition expenses were incurred after the accident.

[42] Section 21 of the *Schedule* sets out the eligibility criteria for entitlement to lost educational expenses. Section 21(1) states:

> The insurer shall pay for up to $15,000 for lost educational expenses incurred by or on behalf of an insured person who sustains an impairment as a result of an accident if,
>
> a. at the time of the accident, the insured person was enrolled in a program of elementary, secondary, post-secondary or continuing education; and
>
> b. as a result of the accident, the insured person is unable to continue the program. O. Reg. 34/10, s. 21 (1).

[43] Section 21(5) provides some guidance regarding what a lost educational expense is. Section 21(5) defines a lost educational expense as:

> In this section, "lost educational expenses" means expenses incurred before the accident for tuition, books, equipment or room and board in respect of the program term or program year in which the insured person was enrolled at the time of the accident, if the expenses are related to the program that the insured person is unable to continue.

[44] Sections 21(1) and 21(5) of the *Schedule* need to be read together for the purposes of determining whether the applicant is entitled to lost educational expenses. In addition to establishing the eligibility criteria in section 21(1), the applicant will also need to prove the following:

1. The expenses were incurred before the accident;
2. The expenses were for tuition, books, equipment or room and board;
3. The expenses were in relation to the program in which she was enrolled in at the time of the accident; and
4. The expenses were related to the program that she was unable to continue.

[45] The applicant submits that she was enrolled at the University of Toronto at the time of the accident. She submits that she lost $10,074.00 in tuition expenses as a result of the accident, as she failed one exam and had to defer another, which she ultimately failed. To support this position, she relies on her self-reporting to

Dr. Cohen during the s. 44 psychological assessment, and the Account Invoice from the University of Toronto.

[46] The respondent submits that the applicant is not entitled to lost educational expenses for two reasons. First, in accordance with s. 21(1) of the *Schedule*, she is only entitled to the expenses if she was unable to continue the program. Second, the applicant incurred the expenses after the accident, meanwhile in accordance with s. 21(5), she would only be entitled to the expenses if they were incurred before the accident.

[47] The applicant incurred the expenses for the two courses in dispute after the accident, and as such, she is not entitled to lost educational expenses. The Account Invoice provided by the University of Toronto, shows that the applicant paid the tuition for the 2019 fall term on August 15, 2019, and for the 2020 Winter term on December 3, 2019, both dates are after the accident.

[48] The respondent cited a previous Tribunal decision of: *C.S. v. Echelon General Insurance Company*, 2020 CanLII 87989 (ON LAT), where Adjudicator Kaur wrote that:

> "Section 21(5) of the *Schedule* makes it clear that a lost educational expense, such as room and board, must be incurred before the accident. In this particular case, the evidence shows that the expense for room and board was incurred after the accident. The applicant did not pay rent for the unit prior to the accident. In my view, the applicant has not provided me with any evidence that supports entitlement to lost educational expenses for room and board. An applicant must satisfy all of the criteria set out in sections 21(1) and 21(5) of the *Schedule* when seeking lost educational expenses."

[49] While I am not bound by previous Tribunal decisions, I am persuaded by the reasoning provided by Adjudicator Kaur and find that the applicant is not entitled to the lost tuition fees in relation to the two courses, as she incurred the expenses after the accident.

[50] I find that granting this expense would be a departure from what the legislature intended. While I acknowledge that the timing of the accident is unfortunate, the fact that the legislature has required that this expense be incurred prior to the accident leads me to believe that expenses that are incurred after an accident should not be considered as lost educational expenses.

[51] To sum up, I find that the applicant is not entitled to the lost educational expenses as she incurred the expenses after the accident.

The applicant is not entitled to Interest

[52] Given there are no overdue payment of benefits, the applicant is not entitled to interest pursuant to s. 51 of the *Schedule*.

The respondent is not liable to pay an Award

[53] The applicant sought an award under s. 10 of *Regulation 664*, submitting that the respondent unreasonably withheld and delayed the payment of the benefits and failed to consider the medical evidence before it. I find an award is not appropriate. The test for a s. 10 award is whether the insurer's behaviour is excessive, imprudent, stubborn, inflexible, unyielding or immoderate. Where I have determined that no benefits are payable to the applicant, it follows that I have no basis on which to grant an award due to the respondent unreasonably withholding or delaying the payment of benefits.

ORDER

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

i. The applicant is not entitled to NEB.

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

iii. The applicant is not entitled to $10,074.00 for lost educational expenses.

iv. The respondent is not liable to pay an award.

v. The application is dismissed.

Released: February 20, 2024

Tanjoyt Deol
Adjudicator