Citation: Bhairo v. Peel Mutual Insurance Company, 2024 ONLAT 21-015214/AABS

Licence Appeal Tribunal File Number: 21-015214/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:

Anjali Bhairo

Applicant

and

Peel Mutual Insurance Company

Respondent

DECISION

VICE-CHAIR: **Julian DiBattista**

APPEARANCES:

For the Applicant: Glen B. Cox, Paralegal

For the Respondent: Evan Argentino, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Anjali Bhairo, the applicant, was involved in an automobile accident on July 24, 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, Peel Mutual Insurance Company, 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 25, 2020 to date and ongoing?

ii. Is the applicant entitled to $2,200.00 for a Chronic Pain Assessment, proposed by Limitless Rehab in a treatment plan dated July 13, 2021?

iii. Is the applicant entitled to $539.90 ($989.90 less, $450.00 approved) for other assistive devices (cervical pillow, aqua pillow, exercise equipment, weighted blanket) proposed by Limitless Rehab in a treatment plan dated July 7, 2021?

iv. Is the applicant entitled to $1,274.41 for occupational therapy services, proposed by Limitless Rehab in a treatment plan dated July 6, 2021?

v. Is the applicant entitled to $1,995.56 for physiotherapy services, proposed by Limitless Rehab in a treatment plan dated October 6, 2021?

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

RESULT

[3] The applicant is entitled to $422.86 in NEBs.

[4] The applicant is entitled to interest on the above amount from February 5, 2021 to the date of payment.

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

ANALYSIS

The applicant has not proven a complete inability to carry on a normal life

[6] The applicant has not proven a complete inability to carry on a normal life and therefore has not met the test to receive an NEB. However, the respondent was in breach of the s. 36 timelines when denying the NEB. Pursuant to s. 36(6), the applicant is entitled to $422.86 in NEB covering the period prior to the respondent's denial.

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

The respondent did not comply with s.36 timelines when responding to the OCF-3

[8] I find that the applicant is entitled to NEBs in the amount of $422.86 as the respondent denied the specified benefits claimed on the 12th day after receipt of the application.

[9] The applicant submits that the respondent failed to comply with s. 36(4) of the *Schedule,* specifically that they did not respond to the application within 10 business days as required. In their submissions, the applicant states that they "initially submitted a Disability Certificate (OCF-3) to Peel on or about January 19, 2021." The applicant notes that the first s. 33 request that addressed the NEB was made on July 27, 2021 and requests that, per the *Schedule* the applicant be entitled to the NEB which they submit was never properly denied.

[10] In their sur-reply, the respondent has provided a copy of the Notice of Assessment dated February 5, 2021, which references an Explanation of Benefits sent February 4, 2021. This Explanation of Benefits is included in the Applicant's Production Brief, tab L, page 202.

[11] February 4, 2021 is 12 business days after January 19, 2021. The adjuster's log notes confirm that the OCF-3 in question was received on January 19, 2021 and

the notes do not reference any deficiencies in the submitted OCF-3. The notes reference the fact that this OCF-3 is for specified benefits.

[12] The applicant submits that the February 4, 2021 Explanation of Benefits is deficient as the February 5, 2021 Notice of Assessment repurposes s. 44 examinations that were originally scheduled for MIG applicability to also address the NEB.

[13] The respondent submits that the February 4, 2021 Explanation of Benefits is sufficient notice under the *Schedule*. The respondent has also submitted the February 5 Notice of Assessment as evidence.

[14] Section 36(4) of the *Schedule* sets out the insurer's requirement after receiving the OCF-3:

> (4) Within 10 business days after the insurer receives the application and completed disability certificate, the insurer shall,
>
> (a) pay the specified benefit;
> (b) give the applicant a notice explaining the medical and any other reasons why the insurer does not believe the applicant is entitled to the specified benefit and, if the insurer requires an examination under section 44 relating to the specified benefit, advising the applicant of the requirement for an examination; or
> (c) send a request to the applicant under subsection 33 (1) or (2).
> O. Reg. 34/10, s. 36 (4).

[15] As per the *Schedule*, in the notice of denial, the respondent is required to provide medical or other reasons why the respondent does not believe the applicant is entitled to the benefit and if a s. 44 examination is being requested, advising the applicant of the requirement for an examination. Proper notice of the s.44 examination is not required for a denial to be valid under s.36(4).

[16] In the Explanation of Benefits dated February 4, 2021, the respondent provides medical reasons referencing that the diagnosed impairment as a result of the accident does not appear to support a complete inability to carry on with normal life. The respondent also notes that they require the applicant to attend a s. 44 examination.

[17] As this Explanation of Benefits includes both medical reasons and advises the applicant of the requirement for a s. 44 examination, I find that this benefit was properly denied on the 12th business day following receipt of the OCF-3.

[18] However, as per the *Schedule* this denial was 2 business days late. Therefore, I find the applicant is entitled to the income replacement benefit for the 16-day period between January 19, 2021 to February 4, 2021. Sixteen days at $185.00 per week equals $422.86 which I find to be the applicant's entitlement.

The applicant has not proven a complete inability to carry on a normal life

[19] The applicant submits two pieces of evidence to support her entitlement to an NEB: clinical notes and records from Dr. L. Lobo, the applicant's family physician, and a report dated May 27, 2021 from Ms. R. Dhaliwal, registered psychotherapist, and Ms. Anna Kozina, psychological associate.

[20] In the psychological report, it is stated that the applicant has experienced a 40% loss in her functional ability due to pain and fatigue. The report also confirms that while she still drives, she no longer drives on highways. It is also noted that she requires assistance from her mother to perform household chores.

[21] There are factors which lead me to give less weight to the report by Mses. Kozina and Dhaliwal. Firstly, it appears that Ms. Kozina, never met or assessed the applicant in person. The interview and assessment were conducted by Ms. Dhaliwal. Secondly, there was a very limited review of the applicant's medical history, the only document reviewed was the s. 44 report of Dr. J Dudley. This is in contrast to the s. 44 assessments which noted reviews of medical records dating back to 2017. Finally, this report fails to make a definitive finding on the test required to determine NEB eligibility. The question is posed as the first referral question; however, the response provided does not definitively answer the question.

[22] The respondent points to s. 44 examinations conducted by Dr. Dudley, psychiatrist, and Dr. R Stein, rheumatologist.

[23] Dr. Dudley assessed the applicant on May 18, 2021. He reviewed the medical records of the applicant dating back to 2017 and found that from a psychiatric perspective, the applicant has not suffered a complete inability to carry on a normal life as defined in the *Schedule.*

[24] Dr. Stein assessed the applicant on April 19, 2021. He reviewed the medical records of the applicant dating back to 2017. He notes that the applicant does not suffer a complete inability to carry on a normal life as a direct result of the injuries sustained in the accident.

[25] From the submissions made, I am not satisfied that the applicant has established a complete inability to carry on a normal life. It should be noted that the loss in functional ability as documented by Ms. Kozina and Ms. Dhaliwal is only 40%. In my view, that does not constitute a complete inability to carry on a normal life. The applicant continues to drive, albeit not on the highway and according to the medical evidence has continued her studies at York University with a courseload of 2-3 courses per term. These are examples of activities of a normal life that the applicant is still capable of participating in.

[26] Based on the submissions and evidence provided, the applicant has not proven a complete inability to carry on a normal life and is not entitled to an NEB.

The applicant has not proven entitlement to any of the disputed treatment plans

[27] The applicant has not proven any of the dispute treatment plans are reasonable or necessary.

[28] To receive payment for a treatment and assessment plan under s. 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 the assessment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

A chronic pain assessment is neither reasonable nor necessary

[29] The applicant has failed to prove that she is entitled to $2,200 for a chronic pain assessment from the treatment plan dated July 13, 2021.

[30] The applicant submits that as a result of the accident she developed chronic pain. The applicant further submits that the respondent denied this treatment plan based on s. 44 reports that did not reference chronic pain, but physiotherapy.

[31] The respondent submits that the chronic pain assessment is not reasonable or necessary for several reasons. Firstly, the applicant's family physician, Dr. Lobo has not recommended or prescribed a chronic pain assessment. Secondly, the respondent points to the s. 44 report of Dr. Stein and Dr. Dudley to support their position.

[32] The burden of proof to show that the treatment plan is reasonable or necessary falls on the applicant. Evidence must be presented before the Tribunal that an

entitlement exists under the *Schedule*. Neither submissions nor comments within the treatment plan are evidence that the treatment plan is reasonable or necessary.

[33] In their submissions, the applicant has not referenced any medical evidence as support for this treatment plan.

[34] As the burden falls on the applicant, and no supporting evidence has been submitted to the Tribunal, I find that the applicant has not proven entitlement to the disputed treatment plan.

The applicant is not entitled to $539.90 for assistive devices

[35] The applicant has not proven her entitlement to assistive devices as proposed in the treatment plan dated July 7, 2021 for $539.90.

[36] The treatment plan in dispute is for the purchase of a cervical (neck) pillow, a weighted blanket and an aqua pillow.

[37] The applicant has referenced no evidence in support of this treatment plan. Outside of the treatment plan, there has been no recommendation for any of these three items from any of the applicant's treating clinicians.

[38] The respondent has noted that there is no medical evidence to support this treatment plan.

[39] The burden of proof lies with the applicant to prove that each assistive device is reasonable and necessary. This cannot be done without providing evidence. The treatment plan alone is not sufficient evidence to prove the treatment plan is reasonable or necessary.

[40] Therefore, I find that the applicant has failed to prove this treatment plan is reasonable or necessary.

The applicant is not entitled to occupational therapy services

[41] I find that the applicant is not entitled to $1,274.41 for occupational therapy services as outlined in a treatment plan dated July 6, 2021.

[42] The applicant's position is that the benefit should be payable as the respondent's Notice of Assessment was deficient. The applicant also notes at paragraph 33 of their submissions, "We believe that Dr. Lobo's CNRs, Dr. Paul Jensen's CNRs,

and Angela Bertolo's report following the applicant's testing as mentioned above are medical documentation provided as a result of any accident-related injuries."

[43] The respondent's position is that the s. 44 assessment of Ms. A. Bertolo, occupational therapist, does not support the proposed treatment plan.

[44] As was mentioned above, denial of a benefit is not contingent upon the Notice of Assessment; instead, it depends on the Explanation of Benefits. As the applicant has not submitted any arguments on why the Explanation of Benefits is deficient, I find that they have failed to prove the denial was deficient. If the notice of the s. 44 examination was deficient, this would factor into a scenario where the applicant was denied a benefit for s. 44 non-attendance. However, all parties agree in their submissions that the applicant has attended every s. 44 examination.

[45] While the applicant has referenced medical evidence, the evidence referenced is not sufficient to prove entitlement to a benefit. Vaguely referencing years of clinical history which cover 50 pages of records is not a valid argument. Specific references must be made to direct notations where the practitioners referenced above support the treatment plans in dispute. Both the applicant and respondent point to Ms. Bertolo's report as evidence for their position. Reasons need to be given, passages need to be quoted and arguments need to be made on why this report, or any other medical evidence supports a position. The applicant has failed to advance these arguments.

[46] I find that the applicant has failed to prove entitlement to the disputed treatment plan.

The applicant is not entitled to physiotherapy services

[47] I find that the applicant has not proven an entitlement to $1,995.56 physiotherapy services as proposed in a treatment plan dated October 6, 2021.

[48] The applicant submits that the denied treatment plan is reasonable and necessary based on a referral from Dr. Lobo dated February 7, 2022 for continued physiotherapy treatment. The applicant also submits that the s. 44 reports relied on by the respondent should be given limited weight as they are based on examinations conducted in April 2021 and do not reflect the results of physiotherapy to date, and do not provide reasons why continued physiotherapy would not be beneficial to the applicant.

[49] The respondent points to the s. 44 report of Dr. Stein who recommended that the applicant continue home-based self-directed active exercises as opposed to formal facility-based measures. The respondent also notes that in June 2021 the applicant reported to Dr. Lobo that she was not improving with physiotherapy treatment and that on February 7, 2022, Dr. Lobo recommended the applicant consider exercise.

[50] The applicant makes a valid point in that the findings of Dr. Stein may be stale for the treatment plan dated October 6, 2021. The February 7, 2022 note by Dr. Lobo did not exist when the treatment plan was proposed. I give limited weight to both pieces of evidence as they do not support the needs of the applicant in October of 2021.

[51] I place the most weight on the June 14, 2021 clinical note of Dr. Lobo which states that the physiotherapist says the applicant is not improving. This notation is the closest in time to the disputed treatment plan, and offers the best indication of whether continued physiotherapy would help the applicant. According to this note, there is no more improvement.

[52] As physiotherapy has shown to no longer be improving the applicant's condition, I find that the applicant is not entitled to further physiotherapy treatment.

Interest

[53] The respondent will pay interest on the overdue NEB benefit as per the *Schedule* from February 5, 2021 to the date of payment.

ORDER

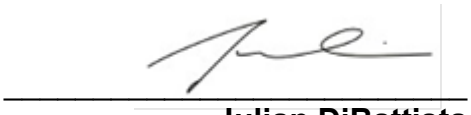
[54] I order as follows:

i. The applicant is entitled to $422.86 in non-earner benefits;

ii. The applicant is entitled to interest in accordance with s. 51 of the *Schedule* for the above NEB amount; and

iii. The applicant is not entitled to any of the disputed treatment plans.

Released: March 7, 2024



Julian DiBattista
Vice-Chair