Citation: Vasquez v. Allstate Insurance Company, 2024 ONLAT 22-003702/AABS

Licence Appeal Tribunal File Number: 22-003702/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:

Lorenzo Vasquez

Applicant

and

Allstate Insurance Company

Respondent

DECISION

ADJUDICATOR: **Ulana Pahuta**

APPEARANCES:

For the Applicant: Bambi Santiago, Paralegal

For the Respondent: Sonya Katrycz, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Lorenzo Vasquez, the applicant, was involved in an automobile accident on December 30, 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 the respondent, Allstate 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. 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?

ii. Is the applicant entitled to $2,000.48 for physiotherapy, chiropractic, and massage therapy, proposed by Pain Rehabilitation Clinic in an OCF-18 submitted April 1, 2020?

iii. Is the applicant entitled to $2,600.64 for physiotherapy, chiropractic, and massage therapy, proposed by Pain Rehabilitation Clinic in an OCF-18 submitted June 19, 2020?

iv. Is the applicant entitled to $2,600.64 for physiotherapy, chiropractic, and massage therapy, proposed by Pain Rehabilitation Clinic in an OCF-18 submitted October 2, 2020?

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

RESULT

[3] I find that:

i. The applicant has not established that his accident-related impairments warrant removal from the MIG.

ii. The applicant is entitled to whatever amount remains within the $3,500.00 MIG limit as of the date of this decision, as such benefits are deemed reasonable and necessary once incurred, pursuant to s. 40(8) of the *Schedule*. Interest applies to the payment of overdue benefits in accordance with s. 51 of the *Schedule*.

MOTION TO STRIKE RESPONDENT'S SUBMISSIONS

[4] The applicant's motion to strike the respondent's written hearing submissions is denied.

[5] The applicant brought a Notice of Motion on October 27, 2023 with respect to the respondent's late-filed submissions. He submits that pursuant to the Case Conference Report and Order ("CCRO") the respondent's written hearing submissions and evidence were due on October 20, 2023. However, the respondent did not file its submissions and evidence until October 24, 2023.

[6] The applicant argues that the respondent's late-filing has prejudiced his ability to defend his claim and that a motion for late-filing should have been brought forth by the respondent. He submits that he was forced to complete his reply submissions within three days, losing four days by the respondent's actions. The applicant cites Rule 9.4 of this Tribunal's Common Rules of Practice & Procedure which holds that "If a party fails to comply with any Rules, directions or orders with respect to disclosure or inspection of documents or things, or list of witnesses, that party may not rely on the document or thing as evidence, or call the witnesses to give evidence, without the consent of the Tribunal."

[7] The respondent submits that it had erroneously calculated its date of submission as Saturday October 21, 2023 rather than Friday October 20, 2023. It attempted to file as soon as possible thereafter. The respondent submits that it would contravene natural principles of justice to strike the entirety of its case due to an error and delay of a few days. Rather, it argues that its error could have easily been remedied by adjusting the timeline of the applicant's reply submissions by a few days. However, it submits that the applicant did not make such a request, filed his submissions on time and then brought a motion to strike the respondent's submissions.

[8] While I agree with the applicant that the respondent did not file its submissions and evidence until October 24, 2023, I decline to strike the respondent's materials.

[9] While I appreciate that the applicant had less time to prepare his reply, when considering the prejudice to both parties I find that excluding the respondent's submissions and evidence in this manner would be unduly prejudicial and contrary to procedural fairness, pursuant to Rule 3.1(a) of the Licence Appeal Tribunal Rules. By striking the entirety of the respondent's case, it would effectively be barred from participating in these proceedings.

[10] Moreover, I find the decisions cited by the applicant in support of his position to be distinguishable. In *Pulcine v. Wawanesa Insurance*, 2023 CanLII 52285 (ONLAT) and *Ahmed v. Economical Mutual Insurance Company,* 2023 CanLII 50618 (ON LAT), only isolated documents were excluded from evidence as they had been produced for the first time as part of written hearing submissions. In *Ahmad v. Economical Insurance Company*, 2023 CanLII 34465 (ONLAT), the applicant's submissions were struck in their entirety, however, the delay in that case was substantial. The applicant had failed to file his initial written hearing submissions until after the respondent had filed its hearing submissions and after the written hearing date had passed. As such, I find these decisions to be of limited persuasive value.

[11] As part of the motion, the applicant also requested costs under Rule 19 which I will address below.

ANALYSIS

Minor Injury Guideline

[12] 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 from any accident-related minor injury 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 submits that he should be removed from the MIG due to chronic pain and his pre-existing back pain.

The applicant has not established pre-existing impairments that warrant removal from the MIG

[15] The applicant submits that the accident aggravated his pre-existing lower back pain. He relies on the clinical notes and records ("CNRs") of his family physician Dr. Jawaid, noting that in January and February 2017, the applicant reported lower back pain and an X-ray was ordered. The X-ray showed that the applicant had osteophyte formation or "bone spurs" which the applicant asserts can cause pain. As such, the applicant argues that he suffered from a pre-accident back impairment and pain documented by his doctor.

[16] I do not find that the applicant has met his onus to prove a pre-existing injury which precludes recovery within the MIG.

[17] I agree with the respondent that although the applicant is citing his back impairment and pain as a pre-existing impairment, these CNR entries are from almost three years pre-accident. The applicant has not directed me to any evidence that these complaints continued after February 2017.

[18] Further, the applicant has not met the additional requirement under s. 18(2) of the *Schedule*. Namely, the applicant has not provided sufficient medical evidence from a treating medical practitioner that acknowledges that these pre-existing injuries impacted on his ability to achieve maximum medical recovery under the MIG. Although the applicant complained of back and neck pain to Dr. Jawaid soon after the subject accident, he does not direct me to any evidence that he continued to report such symptoms to Dr. Jawaid after February 6, 2020. Nor has the applicant directed me to an opinion from Dr. Jawaid or any other treating medical practitioner that the 2017 reports of back pain impacted his recovery under the MIG.

The applicant has not established accident-related chronic pain

[19] I do not find that the applicant has led sufficient medical evidence to establish accident-related chronic pain. The CNRs of Dr. Jawaid indicate only a few reports of neck and back pain post-accident. In January and February 2020, Dr. Jawaid recommended physiotherapy, prescribed Celebrex and Flexeril and suggested a follow-up in one to two weeks if needed.

[20] The applicant does not direct me to any subsequent CNRs after February 6, 2020 where he raised the issue of ongoing pain with Dr. Jawaid. The applicant has not led evidence of a chronic pain diagnosis, or any referrals for pain treatment. Although the applicant was prescribed pain medication and a muscle

relaxant soon after the accident, he has not provided evidence that this continued after the first few months.

[21] To establish his chronic pain, the applicant relies in large part on the treatment records of his physiotherapy clinic. He argues that the pain diagrams show his ongoing pain reports post-accident, and that pain reports need not necessarily be made to a doctor. While I accept that pain reports may be made to different medical treatment providers, I do not find that the applicant has provided sufficient medical evidence of pain of the duration, severity and functionally disabling extent necessary to establish chronic pain.

[22] The applicant has provided insufficient evidence of functional restrictions due to pain. He points to his reports in the physiotherapy pain diagrams that pain affected his work and sleep and that he was working light duties as a welder. The applicant further references his self-reports to the respondent's s. 44 physiatry assessor Dr. Dessouki that he completes his personal care activities at a slower pace, and that he has difficulty with prolonged standing, lifting and carrying.

[23] I find that these limited self-reports are insufficient evidence of functionally disabling chronic pain. The applicant returned to his job as a welder full-time soon after the accident, although he states that he had "light duties". However, no evidence was provided of a workplace accommodation due to pain. The applicant does not direct me to reports of functional restrictions to his family physician. Further, Dr. Dessouki conducted a physical examination and found that the applicant had active range of motion in the neck and upper back, without reports of pain. Dr. Dessouki did not find any evidence of ongoing musculoskeletal impairment that would substantiate any disability with respect to the applicant's activities of daily living.

[24] A such, I find that the applicant has failed to establish accident-related chronic pain warranting removal from the MIG.

Treatment Plans

[25] As I have found the applicant to be within the MIG, it is not necessary for me to consider the reasonable and necessary nature of the treatment plans in dispute.

[26] In their submissions, the parties have not confirmed whether the applicant has exhausted the MIG limit of $3,500.00. Pursuant to s. 40(8) of the *Schedule*, the applicant is entitled to whatever amount remains within the $3,500.00 MIG limit as of the date of this decision, as such benefits are deemed reasonable and

necessary. Interest applies to the payment of overdue benefits in accordance with s. 51 of the *Schedule*.

Costs

[27] The applicant requests costs on the basis that the respondent was late in filing its case conference summary, failed to attend the case conference (although its counsel attended), failed to provide certain productions, late-filed its submissions and evidence without notifying the applicant or filing a motion requesting the late admission and failed to properly bookmark, tab or page number its submissions.

[28] Rule 19.1 of the LAT Rules states that a party may request costs where they believe that the other party has acted unreasonably, frivolously, vexatiously or in bad faith in a proceeding. I find that the test is not met in this case.

[29] I do not find that the applicant has established that costs are warranted. Although I agree with the applicant that the respondent late-filed its submissions and evidence without notifying the applicant or bringing a motion, I do not find that the applicant has led sufficient evidence this behaviour has met the high threshold for costs. Although the respondent failed to attend the case conference and late-filed its case conference summary, its counsel attended and the matter was set down for a written hearing and productions were ordered. As such, the applicant has not established behaviour that is unreasonable, frivolous, vexatious or in bad faith.

ORDER

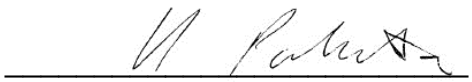
[30] I find that:

i. The applicant has failed to establish that his accident-related impairments warrant removal from the MIG.

ii. The applicant is entitled to whatever amount remains within the $3,500.00 MIG limit as of the date of this decision, as such benefits are deemed reasonable and necessary once incurred, pursuant to s. 40(8) of the *Schedule*. Interest applies to the payment of overdue benefits in accordance with s. 51 of the *Schedule*.

iii. The application is dismissed.

Released: May 27, 2024



Ulana Pahuta
Adjudicator