



Citation: Ling v. Allstate Insurance Company of Canada, 2024 ONLAT 22-008690/AABS

Licence Appeal Tribunal File Number: 22-008690/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:

Wei Xiong Ling

Applicant

and

Allstate Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Ulana Pahuta

APPEARANCES:

For the Applicant: Anil Hampole, Counsel

For the Respondent: Jodie Therrien, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] Wei Xiong Ling, the applicant, was involved in an automobile accident on October 26, 2021, 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 of Canada, 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 (“MIG”)?
 - ii. Is the applicant entitled to a non-earner benefit of \$185.00 per week from November 24, 2021 to October 26, 2023?
 - iii. Is the applicant entitled to \$4,115.12 for physiotherapy services, proposed by Total Recovery Rehab Centre in a treatment plan dated March 10, 2022?
 - iv. Is the applicant entitled to \$2,200.00 for a psychological assessment, proposed by Somatic Assessments and Treatment Clinic in a treatment plan dated December 24, 2021?
 - v. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
 - vi. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] I find that:
- i. The applicant’s accident-related impairments do not warrant removal from the MIG;
 - ii. The applicant is not entitled to the treatment plans in dispute, or interest;

- iii. The applicant is not entitled to a non-earner benefit for the period in dispute; and
- iv. The respondent is not liable to pay an award.

ANALYSIS

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

- [4] The applicant has provided limited medical evidence of non-minor accident-related impairments.
- [5] The applicant submits that post-accident he has been suffering from ongoing neck, back and shoulder pain. From this, I infer that he is arguing that he should be removed from the MIG on the basis of chronic pain. However, the medical record does not establish ongoing pain complaints beyond the first few months post-accident. The clinical notes and records (“CNRs”) of the applicant’s family physician Dr. Lawrence Kwan, indicate that the applicant complained of neck and low back pain only in the month and a half post-accident. The applicant does not direct me to any additional CNR entry after December 1, 2021 where he reported ongoing accident-related pain to his family physician. Moreover, on November 4, 2021 the applicant reported that his pain had improved, and on December 1, 2021 he reported only intermittent back pain.
- [6] The applicant has not led any evidence of a chronic pain diagnosis or a referral for chronic pain treatment. Further, although the applicant reported to Dr. Kwan that he had been attending physiotherapy, no treatment records have been provided from his physiotherapy clinic to establish ongoing accident-related impairments or pain. The respondent conducted a s. 44 psychiatry assessment and Dr. Alborz Oshidari, psychiatrist, found that the applicant had sustained only uncomplicated sprain/strain type injuries and had reported 60 to 70% improvement in his symptoms. Dr. Oshidari found that the applicant’s injuries could be treated within the MIG. The applicant has not led sufficient medical evidence to dispute Dr. Oshidari’s findings. As such, I find that the applicant has not met his onus of establishing pain of the duration, severity and functionally disabling extent necessary to warrant removal from the MIG.
- [7] I further find that the applicant has not established an accident-related psychological impairment warranting removal from the MIG. The CNRs of Dr. Kwan do not indicate any reports of psychological symptoms post-accident. Rather, the CNR entry on January 4, 2022 states “mood normal, no depression”.

The respondent's s. 44 psychological assessor Dr. Godwin Lau noted that the applicant reported that he did not require psychological intervention. Dr. Lau conducted an interview and psychometric testing, and found that the applicant did not sustain a psychological impairment as a result of the accident. The applicant has not led any medical evidence to refute Dr. Lau's findings.

- [8] The only evidence led by the applicant is support of his claim of a psychological impairment is the OCF-18 form itself. In the OCF-18 dated December 24, 2022, it was noted that the applicant exhibited emotional distress, and struggled with emotions such as anxiety, sadness, loneliness and helplessness. However, I agree with the respondent that although the applicant states that the OCF-18 interview summary and conclusions were those of Dr. Sharleen McDowell, psychologist, it appears that the interview was conducted by Yvonne Ma, R.P., who would not be qualified to provide a psychological diagnosis. Further, no psychometric testing was provided as part of this pre-screening. When weighing the s. 44 assessment of Dr. Lau against the interview summary in the OCF-18, I am persuaded by the respondent's evidence.
- [9] As such, I find that the applicant has not met his onus to prove accident-related impairments warranting removal from the MIG.

Treatment Plans

- [10] The parties confirmed in the Case Conference Report and Order dated April 17, 2023 that the maximum of \$3,500.00 for medical and rehabilitation benefits available under the MIG has been exhausted. As I have found that the applicant has failed to prove that his accident-related impairments warrant treatment beyond the MIG limits, it is unnecessary for me to consider the reasonableness and necessity of the disputed treatment plans.

Non-Earner Benefits

- [11] I find that the applicant has not established entitlement to non-earner benefits ("NEBs").
- [12] 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.

- [13] I find that the applicant has failed to prove on a balance of probabilities that he suffers from a complete inability to carry on a normal life.
- [14] The applicant has not provided any specific submissions on his pre-accident activities or demonstrated how his participation in those activities has been limited as a result of the accident. There are no submissions on which activities were most important to him, how he is prevented from engaging in the activities he normally engaged in pre-accident or evidence of the frequency and time commitments of his pre-accident activities, as required by *Heath* and in many NEB cases at the Tribunal, such as *16-003141 v. Aviva Insurance Canada*, 2017 CanLII 46352 (ONLAT). In the absence of this information, it is difficult to compare the applicant's pre and post-accident capabilities with respect to the activities he ordinarily engaged in or valued.
- [15] The applicant further does not direct me to any medical opinion or medical evidence establishing that he suffers a complete inability to carry on a normal life. Although he submits an OCF-3 prepared by Dr. Palantzas, chiropractor, which notes such a restriction, I note that an OCF-3 alone does not establish whether an applicant has sustained a complete inability to carry on a normal life. Rather additional objective medical evidence is required. The CNRs of Dr. Kwan do not indicate any post-accident restrictions to former activities.
- [16] The applicant further relies on his self-reports in his OCF-12 that he cannot lift heavy items or perform housework. However, such self-reports without supporting medical evidence are not sufficient evidence to establish entitlement to NEBs. Further, the respondent's s. 44 physiatry and psychological assessors both found that the applicant did not suffer a complete inability to lead a normal life. The applicant has not led medical evidence to refute their findings.
- [17] As such, I find that the applicant has not established entitlement to NEBs for the period in dispute.

Interest

- [18] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. As no benefits are payable, the applicant is not entitled to interest.

Award

[19] The applicant sought an award under s. 10 of Regulation 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. I find that the applicant has not established that the respondent's behaviour was excessively impudent, stubborn, unyielding or immoderate. As such, the applicant is not entitled to an award.

ORDER

[20] I find that:

- i. The applicant's accident-related impairments do not warrant removal from the MIG;
- ii. The applicant is not entitled to the treatment plans in dispute, or interest;
- iii. The applicant is not entitled to a non-earner benefit for the period in dispute; and
- iv. The respondent is not liable to pay an award.

Released: October 1, 2024

**Ulana Pahuta
Adjudicator**