Citation: Duncan v. Economical Mutual Insurance Company, 2025 ONLAT 23-001360/AABS

Licence Appeal Tribunal File Number: 23-001360/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:

Carolyn Duncan

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Michael Beauchesne**

APPEARANCES:

For the Applicant: Neha Kohli, Paralegal

For the Respondent: Maia Abbas, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Carolyn Duncan (the "applicant") was involved in an automobile accident on May 25, 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 Economical Mutual 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. Are the applicant's injuries predominantly minor as defined in section 3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit of the Minor Injury Guideline ("MIG")?

ii. Is the applicant entitled to a non-earner benefit ("NEB") of $185.00 per week from July 25, 2022 to March 25, 2023?

iii. Is the applicant entitled to the chiropractic treatment proposed by A Med Physiotherapy and Rehabilitation as follows:

(a) $3,204.39 proposed in a treatment plan ("OCF-18") submitted on July 28, 2021 and denied on October 8, 2021;

(b) $2,569.25 proposed in an OCF-18 submitted on November 3, 2021 and denied on November 18, 2021;

(c) $2,095.40 proposed in an OCF-18 submitted on April 6, 2022 and denied on April 26, 2022; and

(d) $1,978.20 proposed in an OCF-18 submitted on January 9, 2023 and denied on January 23, 2023?

iv. Is the applicant entitled to the following goods and services proposed by E Clinic United Healing as follows:

(a) Assistive devices in the amount of $2,173.00 in an OCF-18 submitted on March 11, 2022 and denied on April 4, 2022; and

(b) Psychological services in the amount of $3,710.00 in an OCF-18 submitted on March 11, 2023 and denied on May 25, 2023?

v. Is the applicant entitled to a chronic pain assessment in the amount of $2,529.84, proposed by Q Medical in an OCF-18 submitted on June 27, 2022 and denied on July 5, 2022?

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

RESULT

[3] The applicant remains in the MIG and is not entitled to either the NEB or the disputed OCF-18s. No interest is payable.

PROCEDURAL ISSUES

The respondent requests relief from its written submissions page limit as ordered by the Tribunal

[4] I find that neither party may rely on their submissions past page 10.

[5] The respondent submits that the Tribunal permitted each party 10 pages for submissions at the case conference, and requests leave for an additional three pages that it says were “required to adequately address seven medical benefits, MIG, and entitlement to NEBs.” The respondent adds that the applicant submitted 15 pages of submissions.

[6] The applicant did not address the page limit of her submissions.

[7] I decline to consider the portion of written submissions made by either party that exceed the page limits ordered by the Tribunal. For clarity, this means the applicant may rely on her submissions up to and including paragraph 13. The respondent may rely on its submissions up to and including paragraph 46.

[8] Both parties exceeded the page limit they agreed to at the case conference. The CCRO ordered 10 pages each. The applicant’s submissions are substantively 14 pages long and I agree the respondent’s submissions total 13 pages. The CCRO for this matter indicates all orders were on consent unless otherwise noted, and there is no indication that the parties disputed the page length of submissions ordered by the Tribunal at the case conference. In addition, the parties did not seek to add issues after the case conference that may have required additional submissions. Further, the respondent does not indicate why the 10-page limit it agreed to was not adequate to address the issues in dispute, and the applicant

fails to address its non-compliance with the page limit despite having the opportunity for a reply. Neither party filed a motion to seek relief from the page limit prior to making their submissions despite having more than seven months notice of the hearing.

ANALYSIS

The applicability of the MIG

[9] I find the applicant has not established she should be removed from the MIG.

[10] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured 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."

[11] The applicant may be removed from the MIG if she can establish her accident-related injuries fall outside of the MIG or, under section 18(2), that she has a documented pre-existing condition combined with compelling medical evidence stating that the condition precludes maximal recovery if she is kept within 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.

[12] For this matter, the applicant seeks removal from the MIG owing to a pre-existing condition.

[13] The applicant submits she has a pre-accident history of chronic mechanical low back pain that disabled her and caused her to use a walker for stability. The applicant contends her condition worsened after the accident to include tight muscles, left arm pain and numbness, difficulty sitting, and right hip problems owing to accident-related injuries to her back, neck, and shoulder. The applicant relies on the clinical notes and records of Dr. Holman (family physician) and the Simcoe Clinic, as well as the section 44 Insurer's Examination ("IE") by Dr. Abdul Wahab Khan (physiatrist) to show the accident significantly exacerbated her pre-existing conditions, introduced new medical complications, and led to a substantial decline in the applicant's quality of life and independence.

[14] The respondent does not dispute the applicant's pre-existing low back pain, but argues she failed to show this pain interfered with recovery from her accident-related injuries, all of which are sprains and strains that meet the *Schedule's* definition of minor injury. The respondent says the applicant reported back, neck, and shoulder pain on only one occasion to Dr. Holman, which was three months removed from the accident. The respondent goes on to claim that the "vast majority" of the applicant's post-accident complaints result from progressive degenerative issues and successive falls that are not accident related.

[15] The parties do not dispute that the applicant had a pre-existing condition (i.e., low back pain) and I too accept she has met the first part of the test set out at section 18(2) of the *Schedule*. The applicant produced May 2017 imaging records from the Royal Victoria Hospital that offer a diagnosis of chronic mechanical back pain possibly due to bilateral facet disease. Imaging records from this same hospital in June 2017 definitively attribute the applicant's chronic mechanical low back pain to bilateral lumbar facet disease. Degenerative changes in the applicant's spine were similarly noted in a September 2019 imaging report obtained from Soldiers Memorial Hospital. In my view, this evidence establishes the applicant had a pre-existing condition that was documented by a health practitioner prior to the accident.

[16] I am persuaded, however, that the applicant has not met her onus with respect to the second part of the pre-existing provision. Section 18(2) requires the applicant's health practitioner to determine her pre-existing condition will prevent her from achieving maximal recovery from her accident-related injuries if kept in the MIG. Compelling medical evidence must also be produced to substantiate this medical opinion. The applicant has not done this.

[17] Rather, the applicant's submissions suggest that her "significantly exacerbated pre-existing conditions" lead to the inescapable conclusion that her accident-related injuries cannot be treated within the MIG. In my view, this argument fundamentally misunderstands what the test at section 18(2) of the *Schedule* requires her to prove. The applicant's submissions point to worsening symptoms (i.e., tight muscles, pain and numbness in her left arm, difficulty sitting, and right hip problems) in August 2021 owing to accident-related injuries to her back, neck, and shoulder. Several months later in December 2021, she reported constant hip swelling and a "significant" decrease in mobility. The applicant goes on to relate further complications in 2022 and 2023 pertaining to her left knee, hands, and spinal health. But nowhere in her submissions does she point to a medical opinion whether offered by Dr. Holman, a treating professional at the

Simcoe Clinic, Dr. Khan, or a different health practitioner that determines her accident-related injuries cannot achieve maximal recovery within the MIG.

[18] I placed little weight on the 781 pages of Simcoe Clinic records in the applicant's brief because I was unable to locate the Pain Disability Index scores referenced in her submissions, nor was I able to analyze the applicant's claims that the intensity and frequency of required medical treatments increased after the accident to include more aggressive and comprehensive medical care that is typically not covered under the MIG. The applicant did not pinpoint her evidence by page number as required by the CCRO for this matter, and this hindered my ability to review her evidence.

[19] Similarly, I was unable to find evidence of Dr. Khan attributing worsened back pain and degenerative spine changes to accident-related spinal strains and sprains. But even if the applicant had pinpointed this medical opinion in accordance with the CCRO, the applicant's case would likely still fall short because this evidence as articulated in the applicant's submissions does not establish that Dr. Khan determined the applicant's accident-related injuries cannot achieve maximal recovery within the MIG because her pre-existing back pain was exacerbated.

[20] Taken together on balance, I find this evidence is insufficient to meet the applicant's onus to show she should be removed from the MIG under the pre-existing provision at section 18(2) of the *Schedule*. Given that the applicant has failed to make her case on the merits of her own submissions and evidence, I find it unnecessary to consider the respondent's arguments as they pertain to this issue.

The applicant's entitlement to an NEB

[21] I find the applicant is not entitled to an NEB.

[22] 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) of the *Schedule* 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 ("*Heath*"), which generally focuses on a comparison of the applicant's pre- and post-accident activities.

[23] The applicant submits she was fully independent prior to the accident, engaging in various leisure activities and managing all her household chores without assistance. The applicant explains she now requires aids for mobility, has

decreased participation in hobbies, and experiences difficulties in performing basic self-care and household tasks. The applicant relies on aspects of the section 44 IE in-home functional assessment by Mr. Tony Jung (occupational therapist), the clinical notes and records of Amed Physio Centre, Dr. Khan's report, and the psychological assessment conducted by Dr. Dragica Fink (psychologist) to prove her entitlement to an NEB.

[24] The respondent denies that the applicant's accident-related injuries caused changes in her "already limited functioning" that resulted in her being continuously prevented from engaging in substantially all of her pre-accident activities. The respondent relies on the evidence of its assessors, Mr. Jung and Dr. Charles Pierce (psychologist), and submits that both professionals agree the applicant does not meet the test for an NEB.

[25] The applicant's position that she was fully independent before the accident and became disabled as a result of the accident is not supported by evidence. While the applicant relies on several of the respondent's IE assessments to contrast her pre- and post-accident functionality, her submissions fail to pinpoint the evidence she relies on in these reports as required by the CCRO for this matter. This hindered my ability to assess the veracity of the applicant's submissions.

[26] I find the in-home functional assessment conducted by Mr. Jung does not support the applicant's NEB claim. The applicant submits that the report shows she engaged in various leisure activities and managed her household chores without assistance before the accident, and that after the accident, she demonstrated limited physical capabilities. I disagree. In terms of pre-accident leisure activities, the applicant told Mr. Jung that she ice-skated in the winter, engaged in horseback riding, walked, knitted, and crocheted. The applicant pointed to little evidence in Mr. Jung's report that indicates she is continuously prevented from engaging in substantially all these activities. In contrast, Mr. Jung's report says the applicant continues to knit and crochet post-accident. His report also indicates that the applicant goes for walks outdoors during nice weather with the assistance of a device that the applicant submits she was using pre-accident because of her chronic mechanical low back pain. Mr. Jung's opinion, as expressed in his report, is that the applicant does not meet the NEB test, and I find this is consistent with the disability certificate ("OCF-3") completed

by Ms. Miranda Guo (physiotherapist) in July 2021 (i.e., a couple of months after the accident) that also indicates the applicant is not disabled.

[27] While I accept the applicant's post-accident functioning is impaired to a degree, it does not reach the threshold of a complete inability to carry on a normal life. The applicant says she demonstrated limited physical capabilities during Mr. Jung's assessment, with notable restrictions and pain in her spinal movements during tests. Similarly, the applicant submits that Dr. Khan observed reduced ranges of motion and tenderness in the applicant's spine and shoulders. However, the applicant's submissions do not point me to a medical opinion voiced by Mr. Jung, Dr. Khan, or otherwise that supports a complete inability to carry on a normal life owing to these functional restrictions. I find Mr. Jung determined that despite the applicant's pain complaints, her range of motion was within normal limits on almost every measure. I do not accept that the range of motion restrictions in the applicant's neck and back constitutes disability in the context of NEB entitlement because Mr. Jung noted the applicant could nevertheless fully reach above her shoulder and below her waist, as well as bend over and reach to her knees. He directly observed the applicant's ability to do activities within her home and determined she was capable of continuously bearing her weight and independently ambulating; sitting and arising from a reclining chair; stepping in and out of her bathtub; and rising to both sitting and standing positions from a supine (i.e., lying down) position. Mr. Jung did not corroborate the applicant's reports of disability following the accident. On the contrary, when he considered the applicant's account of her pre-accident daily activities, he assessed that the degree of the applicant's functional decline did not constitute a complete inability to carry on a normal life.

[28] The evidence of Dr. Fink also fell short of supporting the applicant's claim. The applicant points to testing completed by Dr. Fink and asserts it supports a diagnosis of post-traumatic stress disorder and somatization disorder. While I accept Dr. Fink offered these diagnoses at page 10 of his report, I find they do not, in and of themselves, establish the applicant's NEB entitlement. The applicant's submissions direct me to little evidence in Dr. Fink's report that speaks to a relationship between the psychological symptomology associated with her diagnoses and a complete inability to carry on a normal life. For example, the applicant's submissions reference a test (i.e., Travel Anxiety Questionnaire) that indicates her driving is affected by "heightened vehicular anxiety," but Dr. Fink's report ambiguously characterizes her symptomology as "some" anxiety as a driver that causes "avoidance approximately half the time." In my view, this evidence falls short of establishing complete inability as defined by the *Schedule.*

[29] In any event, the applicant did not direct me to evidence of psychological symptomology contemporaneous to the accident, which preceded Dr. Fink's report by almost eight months. I find the applicant made little reference to psychological difficulties in her submissions on Dr. Holman's records as well as those obtained from the Simcoe Centre. Further, her submissions do not point to a referral for psychological assessment or treatment from either of these sources. In my view, the lack of contemporaneous evidence that supports Dr. Fink's opinions diminishes the persuasiveness of the applicant's position.

[30] While I was able to discern that the 21-pages of treatment notes from Amed Physio Centre demonstrated the applicant attended their facilities multiple times from 2021 to 2023, this evidence was otherwise of little help in supporting the applicant's NEB claim because it was largely handwritten and illegible. Further, the applicant's submissions did not specify what aspects of these notes she relies on to show she consistently reported complaints of left knee and lower back pain, along with associated limitations in mobility and functionality.

[31] Taken together on balance, I find this evidence does not demonstrate the applicant's entitlement to an NEB. Given that the applicant has failed to make her case on the merits of her own submissions and evidence, I find it unnecessary to consider the respondent's arguments as they pertain to this issue.

The applicant's entitlement to the disputed OCF-18s

[32] I find the applicant is not entitled to the disputed OCF-18s.

[33] To receive payment for a treatment and assessment plan under 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.

[34] The parties were ordered to disclose any amounts remaining in the MIG. I was unable to find this information in their submissions. Given that I have determined the applicant remains in the MIG, an analysis of the reasonableness and necessity of the disputed OCF-18s is not necessary.

Interest

[35] Interest applies on the payment of any overdue benefits pursuant to section 51 of the *Schedule*. No interest applies in this case because there are no overdue benefits.

ORDER

[36] The applicant remains in the MIG and is not entitled to either the NEB or the disputed OCF-18s. No interest is payable.

[37] The application is dismissed.

Released: March 3, 2025

_____

Michael Beauchesne
Adjudicator