Citation: Kumar v. Aviva Insurance Company of Canada, 2024 ONLAT 22-011924/AABS

Licence Appeal Tribunal File Number: 22-011924/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:

Sandeep Kumar

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Marc Golding, Paralegal

For the Respondent: Jodie Therrien, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Sandeep Kumar, (the "applicant"), was involved in an automobile accident on September 22, 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 Aviva Insurance Company of Canada (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 October 22, 2020 to date and on-going?

ii. 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")

iii. Is the applicant entitled to $4,217.71 for physiotherapy services, proposed by Inline Rehabilitation Centre in a treatment plan/OCF-18 ("OCF-18") dated February 1, 2021?

iv. Is the applicant entitled to $198.32 ($1,293.11 less $1,094.79 approved) for physiotherapy services, proposed by Inline Rehabilitation Centre in a OCF-18 dated December 28, 2020?

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

[3] I note that the Case Conference Report and Order ("CCRO"), released on June 28, 2023, does not list the MIG as an issue in dispute. However, both parties in their submissions acknowledged that the issue of whether the applicant is in the MIG was in dispute. As such, I have added the issue of a MIG determination as indicated above.

RESULT

[4] I find that:

i. The applicant is not entitled to NEB.

ii. The applicant's accident-related injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

iii. He is not entitled to the treatment plans, nor interest.

iv. The application is dismissed.

ANALYSIS

The applicant has not established entitlement to NEB

[5] I find that the applicant has not met his burden to prove his entitlement to NEB.

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

[7] Despite NEB being a live issue in dispute as indicated in the CCRO, the applicant provided no submissions on why he would be entitled to NEB, nor did he point me to evidence that supports his entitlement to the claim. As the onus is on the applicant to establish entitlement to NEB, and he has provided no submissions on this point, it follows that he is not entitled to NEB.

The applicant remains within the MIG

[8] I find that the applicant has not demonstrated on a balance of probabilities that he suffers from a injury or condition that warrants removal from the MIG.

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

[10] 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.

[11] In all cases, the burden of proof lies with the applicant. Here, the applicant argues that he should be removed from the MIG because he has chronic pain and sustained psychological injuries. To support this position, the applicant relies upon the clinical notes and records ("CNRs") of Dr. Bikramjit Nanar, his family physician, and a Disability Certificate ("OCF-3"), completed by Dr. Kevin Bar, chiropractor, dated October 22, 2020.

[12] The respondent counters that at most the applicant suffered minor, soft tissue injuries that fall into the *Schedule*'s definition of a minor injury and that there is no objective evidence of either chronic pain or psychological impairments. The respondent seeks a finding that the applicant be held within the MIG and its $3,500.00 limit on treatment. To this end, it relies upon the s. 44 musculoskeletal examination of Dr. Seung-Jun Lee, general practitioner, dated September 29, 2021.

a) Chronic pain

[13] The applicant's claim of chronic pain lacks sufficient support. Although the applicant asserts in his submissions that his chronic pain claim is supported by the OCF-3 and CNRs of Dr. Nanar, I place no weight on Dr. Bar's diagnosis of chronic post-traumatic headaches. This is because Dr. Bar is a chiropractor, and it is outside of his scope of practice to make neurological diagnoses. This diagnosis is also not supported by the CNRs of Dr. Nanar because the applicant has not once complained about his accident-related impairments. The remaining physical impairments identified in the OCF-3 are sprain/strain type injuries to the cervical, thoracic and lumbar spine, and muscle strain which all fall within the definition of a minor injury under s. 3(1).

[14] Likewise, the records of Dr. Nanar do not support the applicant's position that he has developed chronic pain that would warrant removal from the MIG. From the records tendered, the applicant has not complained about his accident-related impairments to Dr. Nanar. Indeed, the applicant met with Dr. Nanar on two occasions following the accident and advised that he had no complaints (April 4, 2022), and he had difficulty sitting because of a ulcer (October 24, 2022).

[15] While a formal diagnosis of chronic pain is not mandatory in order to be removed from the MIG, I find that the evidence of chronic pain is lacking. This finding is supported by the dearth of medical evidence, the lack of accident-related complaints to Dr. Nanar, and by the s. 44 report of Dr. Lee, who found an unremarkable physical examination, and that the applicant sustained sprain/strain injuries to the thoracic and lumbar spine. On the limited medical evidence available, I see no reason to disagree with this opinion.

b) Psychological impairment

[16] I find that the applicant has fallen well short of meeting his onus to establish that he has psychological impairments to warrant removal from the MIG. Here, the applicant relies solely on the OCF-3 completed by Dr. Bar to support he has a psychological impairment. I place no weight on the psychological diagnoses contained in the OCF-3 because Dr. Bar is a chiropractor and diagnosing psychological conditions is outside of his scope of practice. The applicant also did not complain of psychological symptoms to Dr. Nanar, his family physician. Thus, there is negligible evidence to support that he sustained a psychological impairment, and he remains in the MIG.

Treatment Plans and Interest

[17] Having found that the applicant sustained a predominantly minor injury, it follows that he is subject to the MIG and the $3,500.00 funding limit on treatment. Therefore, an analysis of whether the disputed OCF-18s are reasonable and necessary is not required.

ORDER

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

i. The applicant is not entitled to NEB.

ii. The applicant's accident-related injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

iii. He is not entitled to the treatment plans, nor interest.

iv. The application is dismissed.

Released: November 22, 2024

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Tanjoyt Deol
Adjudicator