Citation: Roopnarine v. Aviva Insurance Company of Canada, 2024 ONLAT 22-010246/AABS

Licence Appeal Tribunal File Number: 22-010246/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:

Vivekanand Roopnarine

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Alexei Antonov, Counsel

For the Respondent: Jodie Therrien, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Vivekanand Roopnarine (the "applicant") was involved in an automobile accident on August 5, 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:

1. 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")?

2. If the applicant is removed from the MIG, then:

   (a) Is the applicant barred from proceeding to a hearing for the following benefit: $2,680.71 for chiropractic services, proposed by Downsview Healthcare Inc., in a treatment plan/OCF-18 ("OCF-18") dated September 7, 2020 (issue (b) below) because the applicant failed to dispute the denial within the 2-year limitation period?

   (b) Is the applicant entitled to $2,680.71 for chiropractic services, proposed by Downsview Healthcare Inc., in an OCF-18 dated September 7, 2020?

   (c) Is the applicant entitled to $307.60 for chiropractic services, proposed by Downsview Healthcare Inc., in an OCF-18 dated November 10, 2020?

   (d) Is the applicant entitled to $900.00 for chiropractic services (shockwave therapy), proposed by Downsview Healthcare Inc., in an OCF-18 dated November 12, 2020?

   (e) Is the applicant entitled to $2,076.80 for chiropractic services, proposed by Downsview Healthcare Inc., in an OCF-18 dated November 26, 2020?

(f) Is the applicant entitled to $1,563.72 for chiropractic services (spinal decompression), proposed by Downsview Healthcare Inc., in an OCF-18 dated December 1, 2020?

(g) Is the applicant entitled to $2,000.00 for a psychological assessment, proposed by Downsview Healthcare Inc., in an OCF-18 dated November 30, 2020?

(h) Is the applicant entitled to $1,946.12 for chiropractic services proposed by Downsview Healthcare Inc., in an OCF-18 dated February 3, 2021?

(i) Is the applicant entitled to $2,000.00 for a chronic pain assessment, proposed by Downsview Healthcare Inc., in an OCF-18 dated February 25, 2021?

(j) Is the applicant entitled to $1,450.00 for physiotherapy services proposed by Downsview Healthcare Inc., in an OCF-18 dated March 18, 2021?

(k) Is the applicant entitled to $3,285.98 for psychological services proposed by Downsview Healthcare Inc., in an OCF-18 dated May 7, 2021?

3. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

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

5. Is the respondent liable to pay $1,000.00 in costs pursuant to Rule 19 of the *Licence Appeal Tribunal Rules*, 2023, (the "*Rules*")?

RESULT

[3] I find that:

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

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

iii. The respondent is not liable to pay an award.

iv. The respondent is not liable to pay costs.

v. The application is dismissed.

PRELIMINARY ISSUES

The applicant's reply submissions will not be struck

[4] On December 14, 2023, the respondent filed a Notice of Motion with submissions wherein it requested that the entirely of the applicant's reply submissions be struck from the record. It argues that the applicant in his reply has restated his arguments, pointed to evidence not previously outlined in his initial submissions, and made new arguments, and as a result it takes the position that the applicant is splitting his case. The respondent has cited for the Tribunal's consideration the leading case pertaining to the rule against splitting one's case*: R. v. Krause*, 1986 CanLII 39 (SCC), [1986] 2 S.C.R. 466 ("*Krause*").

[5] The applicant filed a response on December 22, 2023. He argues that he submitted a proper reply as it does not contain new evidence, and directly responds to the arguments and evidence raised by the respondent in its submissions.

[6] I decline the respondent's request to strike the entirely of the applicant's reply submissions.

[7] To begin, I disagree with the respondent that the applicant's reply submissions from paragraphs two to four are improper because he re-stated his arguments and evidence already contained in the initial submissions. These reply arguments pertained to the applicant's position that he did seek immediate medical attention, that his claim was not clinic-driven, and that he was relying on other evidence beyond Dr. Reginald Gorczynski, family physician's records to support his chronic pain argument. I find that this is a proper reply as the applicant was responding to the arguments raised by the respondent, which he could not have reasonably anticipated and included in his submissions. As such, he was not restating his arguments, but rather was responding to the arguments raised by the respondent.

[8] In *Krause*, it was determined that a plaintiff may be allowed to call evidence in rebuttal when the defence has raised some new matter or defence which he could not reasonably have anticipated (see para. 16). Here, the respondent has not directed me to evidence that supports the applicant was aware that these issues would be raised in its defence, nor am I convinced that the applicant could have anticipated that these issues would have been raised. As such, I find that

this is a proper reply, as the applicant responded directly to arguments that the respondent raised, it seems for the first time in its submissions.

[9] Next, the applicant's reply submissions at paragraph 5 are also proper. In its initial submissions at paragraph 16, the respondent raised issues with respect to the reliability of the s. 25 psychological assessment completed by Ms. Helen Llios, registered psychotherapist, who was supervised by Dr. Jacqueline Brunshaw, psychologist, dated February 12, 2021. In particular, the respondent took the position that Dr. Brunshaw did not directly meet with the applicant and Ms. Llios was not qualified to make the diagnoses that were made in the report.

[10] To respond, the applicant submitted that Dr. Brunshaw had supervised Dr. Llios, who diagnosed the applicant with psychological impairments. In my view, these submissions fit within the purpose of reply submissions since the applicant addressed issues that could not have been reasonably raised in initial submissions. It was unclear to me how the applicant was supposed to anticipate and raise these arguments in his submissions, when he was unaware that the respondent had an issue with the report until its submissions were submitted.

[11] The respondent further alleges that the applicant's reply submissions from paragraphs 6 to 10, are improper as he re-states the arguments he made in his initial submissions. I disagree. In its submissions at paragraphs 25 to 27, the respondent argued that the applicant had not met his burden, that there is no objective evidence of an ongoing accident-related impairment, nor did he provide proof of his chronic pain claim. The respondent further argued at paragraphs 28 to 30 that the applicant did not meet any of the criteria outlined in the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* (the "*Guides*") and raised issues with the applicant's evidence.

[12] I find the applicant's reply submissions from paragraphs 6 to 10 to be proper, as he made arguments to refute the respondent's position and pointed to evidence to support this position, which is the purpose of a reply.

[13] The respondent also raised two concerns with paragraph 7 of the applicant's reply submissions. First, the respondent argues that the applicant submitted at paragraph 7 of his reply submissions, that the respondent's submissions should not be given any weight due to numerous inconsistencies. The respondent submits that this is a broad allegation which is unsupported by the evidence. I agree with the respondent that the applicant did not direct me to evidence to support such a proposition. Instead of striking this paragraph, I find that it has no bearing to my decision. It is well-settled that submissions are not evidence.

Rather, the applicant must provide evidence in support of such submissions, which was not done here.

[14] Now turning to the second concern, the respondent submits that at paragraph 7, the applicant also referred to new evidence and arguments in Dr. Brunshaw's report. To be frank, this is neither new evidence nor improper new arguments being made by the applicant. In fact, Dr. Brunshaw's report was already included in the initial submissions and the applicant made numerous arguments on why it should be preferred. The respondent in its submissions raised arguments on why the report should not be preferred and as such, the applicant made responding arguments and provided reasons why the s. 25 psychological assessment should be preferred over the respondent's evidence. As such, this is neither new evidence nor arguments being raised by the applicant. While the respondent makes the bold submission that it has been prejudiced, it provides no specifics of how so. As such, I decline to strike this paragraph.

[15] Likewise, the respondent submits that paragraphs 8, 9, and 12 should be struck, because the applicant refers to new evidence and new argument. Particularly, the respondent submits that the applicant referred to a new clinical note and record entry from Dr. Gorczynski's office, dated September 16, 2020 at paragraph 8 and made new arguments with respect to the *Guides* at paragraph 12.

[16] I agree with the applicant that he did not refer to a new entry from Dr. Gorcyznski's office. Rather, in his initial submissions, the applicant made a spelling error and identified this entry to be dated as September 26, 2020, instead of September 16, 2020. Regardless of the spelling error, the clinical note and record referred to in the applicant's reply submissions, is the same one that was included in his evidentiary brief with his initial submissions. As such, it is not new evidence.

[17] Finally, I am alive to the respondent's submissions that the applicant did not make any arguments pertaining to the *Guides* until his reply submissions, and as such he is splitting his case. I disagree. While I acknowledge that the applicant did not address the *Guides* in his initial submissions, he made several arguments on why he has chronic pain with functional limitations and referred to evidence to support this position. The respondent in its submissions argued that the applicant did not meet any of the criteria outlined in the *Guides* and made extensive submissions on this point. To respond to the respondent's position, the applicant made counter arguments on why he believed that he met at least three of the criteria under the *Guides* and should be removed from the MIG. This is a proper

reply, as once again, the respondent has not directed me to evidence that the applicant was aware that it would be taking this position prior to its submissions. As such, I find that the applicant could not have reasonably raised these issues in his initial submissions.

[18] In conclusion, I decline to strike the reply submissions of the applicant.

[19] The applicant also requested costs under Rule 19 of the *Rules* as a result of the respondent bringing this motion one day before the scheduled written hearing, and I will address this below.

The respondent's submissions will be considered

[20] On October 17, 2023, the applicant filed a motion with the respondent's consent to have the hearing converted from a videoconference hearing to a written hearing. On October 17, 2023, the Tribunal granted this relief and the video conference hearing was converted to a written hearing. The Tribunal also set the page limit for initial submissions at 10 pages.

[21] On November 29, 2023, with its initial submissions, the respondent advised in a separate correspondence that it did not agree to the page limit of 10 pages as outlined in the motion order, dated October 17, 2023. Furthermore, the respondent submitted that it would be unreasonable to conform its submissions to the page limit due to the number of issues in dispute, and as such, it had exceeded it by two pages.

[22] In reply, the applicant argues that he was compliant with the page limit as mandated in the motion order, dated October 17, 2023, and therefore I should not consider the two additional pages from the respondent.

[23] In accordance with Rule 3.1(a) of the *Rules*, I must ensure that the *Rules* are liberally interpreted to ensure procedural fairness to both parties, and the efficient, proportional, and timely resolution of the merits of the proceedings before the Tribunal.

[24] When weighing procedural fairness and any potential prejudice brought, I find that the respondent would be severely prejudiced if portions of its submissions were otherwise excluded in this matter. The applicant also provided a reply to these submissions, and any potential prejudice which might have effected the applicant would have been mitigated by that. Although, Tribunal orders must be followed, I am prepared to admit the respondent's full submissions in this instance. However, this should not be viewed as tacit acceptance of a blatant

breach of the Tribunal's Order. If the respondent required additional pages, it could have filed a motion with the Tribunal under Rule 15 of the *Rules*. It did not do so.

ANALYSIS

The Minor Injury Guideline

[25] 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."

[26] 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.

[27] In all cases, the burden of proof lies with the applicant.

[28] The applicant submits that he should be removed from the MIG because he sustained psychological impairments and chronic pain with a functional impairment.

[29] Meanwhile, the respondent argues that the applicant has sustained soft tissue injuries, and his injuries are predominantly within the MIG.

The applicant is not removed from the MIG on the basis of his psychological impairments

[30] The applicant has failed to prove on a balance of probabilities that he suffers from a psychological impairment, thus he remains within the MIG.

[31] An applicant can be removed from the MIG if he demonstrates a psychological impairment. A psychological impairment must be more than mere clinically related sequelae of a minor injury. Psychological impairments, if established, fall outside the MIG because the MIG only governs "minor injuries", and the definition does not include psychological impairments.

[32] The applicant submits that the s. 25 psychological report of Ms. Llios and Dr. Brunshaw, and a Disability Certificate ("OCF-3"), completed by Dr. Oleksandr Pivtoran, dated August 21, 2020, establish that he is suffering from a psychological impairment, and therefore he should be removed from the MIG. He further argues that Ms. Llios and Drs. Brunshaw and Pivtoran have diagnosed him with: an Adjustment Disorder with Mixed Anxiety and Depressed Mood, Specific Phobia (driving, passenger and pedestrian related), Behaviour-Acute Stress Reaction and Behavior-symptoms and signs involving emotional state.

[33] The respondent argues that the applicant did not report any psychological sequalae to his family physician, Dr. Reginald Gorczynski. It relies upon the s. 44 reports completed by Dr. Chad Bradbury, psychologist, dated March 8, 2021 and April 21, 2021.

[34] I find that the applicant has fallen far short of proving that he has a psychological impairment as a result of the accident for the following three reasons.

[35] First, the clinical notes and records of Dr. Gorczynski, do not indicate that the applicant reported any psychological symptoms, despite attending on August 26, 2020, September 16, 2020, and October 7, 2020.

[36] Second, I place little weight on the OCF-3 completed by Dr. Pivtoran, where he diagnosed the applicant with behavior-acute stress reaction, and behavior-symptoms and signs involving an emotional state. In my view, diagnosing psychological conditions is outside of the scope of practice of a chiropractor.

[37] Finally, I prefer the report of Dr. Bradbury over the report of Ms. Llios and Dr. Brunshaw, as I find that Bradbury's findings of no accident-related impairment that would be consistent with the DSM-5 diagnosis, is consistent with the medical record, particularly the clinical notes and records ("CNRs") of Dr. Gorczynski.

[38] Thus, the applicant has not satisfied his onus to prove that he has a psychological impairment, and he remains within the MIG.

The applicant is not removed from the MIG on the basis of chronic pain

[35] I find that the applicant has not established that he suffers from a chronic pain condition with functional impairments that would warrant removal from the MIG.

[36] The applicant argues that he has sustained chronic pain in his shoulders and lower back and functional limitations with his various activities, including self-care tasks, housekeeping, home maintenance tasks, social/leisure activities, and

recreational activities. To this end, he relies upon an OCF-3, the CNRs of Dr. Gorczynski, and the OHIP Summary and Decoded List of Services.

[37] The respondent argues that the applicant has sustained minor soft tissue injuries, returned to work on a full-time basis and is independent with his daily activities. It relies upon the s. 44 General Practitioner Assessment, completed by Dr. Ahmad Belfon, physician dated March 8, 2021, and his subsequent paper review reports, dated March 11, 2021, and March 31, 2021.

[38] A chronic pain diagnosis or ongoing pain by itself does not remove the applicant from the MIG. It must be accompanied by some functional impairment, see: *16-000438 v. The Personal Insurance Company*, 2017 CanLII 59515 (ON LAT). A diagnosis of chronic pain without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment will not meet the applicant's burden to show that chronic pain is more than mere sequelae of a minor injury. Unless the applicant provides evidence that the pain he experiences contains these elements, the pain is sequelae of a minor injury. In this regard, the applicant has fallen well short of meeting his onus to establish chronic pain with functional limitations.

[39] First, I acknowledge the applicant's position that Dr. Gorczynski on August 26, 2020, September 16, 2020, and October 7, 2020, noted that the applicant had chronic pain in his shoulders and lower back. Critically, in these entries, Dr. Gorcyzynski also opined that the applicant was working, completing his activities of daily living and had "good" range of motion, and "looks well". The applicant does not direct me to other entries that supports he has functional impairments as a result of his shoulders and lower back pain. These findings are also consistent with Dr. Belfon who opined that there were no objective signs of a physical impairment, aside from residual myofascial pain and tenderness.

[40] Second, the OCF-3 and the OHIP Summary have little probative value in establishing that the applicant has functional limitations as a result of his pain. The OCF-3 is a form used to apply for benefit claims and is not a comprehensive assessment of the functional limitations sustained in an accident and, as such, I place little weight on the limitations contained in it. Likewise, the OHIP Summary is underwhelming, as it contains no evidence on whether the applicant has functional limitations as a result of his pain. To conclude, the applicant has not established that he has functional limitations as a result of his pain.

[41] Finally, at best, the applicant meets only one of the criteria outlined in the *Guides*. While the *Guides* are not incorporated into the *Schedule* or otherwise binding on this Tribunal to determine if someone suffers from chronic pain, they

provide a helpful tool in that they set forth that a person must meet at least three of six criteria to support a diagnosis of chronic pain. These criteria are:

(i) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances;

(ii) Excessive dependence on health care providers, spouse, or family;

(iii) Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain;

(iv) Withdrawal from social milieu, including work, recreation, or other social contacts;

(v) Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family, or recreational needs; and

(vi) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviours.

[42] I am alive to the applicant's position, that he meets criterion (ii), (iv), and (vi).

[43] First, to address criterion (ii), the applicant submits that he is dependant on Downsview Healthcare Inc., because he has been attending consistently. However, the CNRs from Downsview Healthcare Inc., indicate that he last attended for treatment three years ago, therefore I disagree that he is excessively dependant on Downsview Healthcare Inc.

[44] In a similar vein, the applicant relies on his self-reporting to Ms. Llios/Dr. Brunshaw that his wife had to take over all of the housework, and therefore he is dependant on her. However, the applicant also reported to Dr. Belfon that his wife did most of the housekeeping prior to the accident and continues to do so. Moreover, the applicant advised that he continued to help out sometimes. Therefore, I am not satisfied on a balance of probabilities, that the applicant is excessively dependant on his wife.

[45] The applicant has not established that he has withdrawn from social milieu, including work, recreation, or other social contacts. The applicant relies on his self-reporting to Ms. Llios/Dr. Brunshaw that he has lost interest in the activities he used to enjoy. However, he has also reported to Ms. Llios/Dr. Brunshaw that he has returned to work following the accident, and denied experiencing a change in how often he socialized since the accident. Further, while the applicant

reported that he has lost interest in activities that he used to enjoy, he did not provide particulars of which activities and whether he has withdrawn from them. Thus, I find that the applicant has not established that criterion (iv) is met.

[46] The only criterion, the applicant meets is criterion (vi), as Dr. Bradbury concluded that the applicant endorsed a slight degree of post-accident feelings of caution regarding vehicular travel, which was considered to be mild and sub-clinical in nature. Ms. Llios/Dr. Brunshaw also noted that the applicant had symptoms of anxiety when in a vehicle. I find this satisfies criterion (vi), as the applicant does not need to establish that he has a DSM-V diagnosis in order to meet this criterion, and having psychosocial sequelae, like subclinical psychological symptoms, is sufficient. However, in order to establish a diagnosis of chronic pain in accordance with the *Guides*, the applicant has to meet at least three criteria, here, at best, he has met one, and therefore has not established he has chronic pain, that would warrant removal from the MIG.

[47] 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 remove him from the MIG.

Treatment Plans and Interest

[48] The parties did not advise whether the MIG limits have been exhausted. The respondent also raised a preliminary issue with respect to issue (b).

[49] As I have found the applicant's injuries fall within the MIG, it is unnecessary for me to determine whether the claimed treatment plans are reasonable and necessary.

[50] Interest is not payable pursuant to s. 51 of the *Schedule* as there are no overdue amounts owing.

The respondent is not liable to pay an award

[51] The applicant seeks an award and interest under s. 10 of *Reg. 664*. Under s. 10, the Tribunal may award up to 50% of the total benefits payable plus interest if it determines that the insurer unreasonably withheld or delayed the payment of benefits. For conduct to attract a s. 10 award, the conduct must rise above being simply an incorrect decision and be excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

[52] As the applicant has been found to not be entitled to the benefits in dispute, it follows that no benefits were unreasonably withheld or delayed. Consequently, the applicant is not entitled to an award.

The respondent is not liable to pay costs

[53] I find that the respondent is not liable to pay costs to the applicant.

[54] According to the provisions of s. 19 of the *Rules*, a party may make a request to the Tribunal for costs if it believes that the other party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. Such a request for costs may be made to the Tribunal in writing or orally at a case conference or hearing at any time before a decision or order is released. It is the burden of the party that raises a request for costs to support allegations of misconduct.

[55] Here, the applicant requests for $1,000.00 in costs in his written submissions, as the respondent brought a motion one day before the scheduled written hearing, and he argues that he had no time to make responding submissions.

[56] I find that the applicant has not established that the high threshold for costs is warranted. Moreover, the respondent in its Notice of Motion requested that this motion not be heard at the scheduled hearing date, and thereafter to allow the applicant an opportunity to prepare responding submissions, which he did. As such, I am not persuaded that the threshold for costs has been met. Thus, no costs shall be awarded.

ORDER

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

(i) The applicant's injuries are predominantly minor and therefore subject to treatment within the $3,500.00 limit of the MIG.

(ii) He is not entitled to the treatment plans, nor interest.

(iii) The respondent is not liable to pay an award.

(iv) The respondent is not liable to pay costs

(v) The application is dismissed.

Released: October 10, 2024

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Tanjoyt Deol
Adjudicator