LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: **Henry CASTILLO vs. Aviva Insurance Canada, 2019** ONLAT **18-000062/AABS**

Date: June 28, 2019
File Number: 18-000062/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:

H.C.

Appellant(s)

and

Aviva Insurance Canada

Respondent

DECISION

PANEL: **Meray Daoud, Adjudicator**

APPEARANCES:

For the Applicant:	H.C., Applicant Jean-Claude Demarchi, Counsel Jessie V. Tran, Paralegal Bambi Santiaro, Paralegal
For the Respondent:	Ramandeep Pandher, Counsel Christopher Viveiros, Claims Representative

Interpreter: **Samuel E. Lopez, Spanish**

Oral Hearing: **September 26 & 27,2018**

OVERVIEW

[1] The applicant, H.C., was involved in an accident on September 8, 2015, and sought benefits from the respondent, pursuant to the provisions of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*). The applicant's claim for statutory accident benefits was denied by the respondent and the applicant filed an application with the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") to resolve the matter.

ISSUES IN DISPUTE

[2] The issues to be decided at this hearing are:

a) Is the Applicant entitled to receive a non-earner benefit in the amount of $185.00 per week for the period March 7, 2016 to September 7, 2016?

b) Is the applicant entitled to a medical and rehabilitation benefit in the amount of $2,360.00 for chiropractic, massage, physiotherapy treatment, and assistive devices recommended by Kennedy Care Inc. in a treatment plan (OCF-18) submitted on June 14, 2016, and denied on June 27, 2016?

c) Is the applicant entitled to medical and rehabilitation benefits in the following amounts recommended by Pain Rehabilitation Clinic in treatment plans (OCF-18s) submitted as follows:
   i. $2,900.00 for acupuncture, massage, chiropractic treatment, submitted March 23, 2016, and denied on April 4, 2016
   ii. $200.00 for a disability certificate (OCF-3), submitted on October 20, 2017, and denied on October 23, 2017 and;
   iii. $8,000.00 for chronic pain treatment, submitted on October 23, 2017, and denied on October 26, 2017

d) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] Based on the totality of the evidence before me, I find that:

a. The applicant is not entitled to receive a non-earner benefit.

b. The applicant is not entitled to any of the treatment plans.

c. The applicant is not entitled to any interest.

Procedural Issues

[1] O. Reg. 34/10.

[4] The parties brought forth multiple motions, which were dealt with at the hearing.

Applicant's Motions:

[5] The applicant brought a motion to change the time period in dispute for the non-earner benefit. This time period would begin March 7, 2016 rather than March 28, 2016, which was initially claimed in the application.

[6] The respondent objected to amending this time period.

[7] After hearing the parties' submissions on this issue, I granted the applicant's motion to amend the time period in dispute. I granted the repondent a day to prepare their line of questioning with respect to this amended time period.

[8] The applicant's initial testimony would be limited to the issues as stated within the case conference order. There were 20 minutes set aside on day two of the hearing for chief and cross examination of the applicant solely on the amended time period for non-earner benefits.

[9] The applicant also brought a motion to exclude evidence and testimony of the respondent's expert witness, Dr. Maistrelli, Orthopaedic Surgeon.

[10] The applicant's basis for this motion was that the respondent failed to produce the clinical notes and records (cnr's) of Dr. Maistrelli, which were ordered to be produced in the case conference order.

[11] The respondent submitted they did request these records and received a response from Dr. Maistrelli's clinic, advising that they did not have any clinical notes and records to produce. The respondent advised that a copy of the clinic's response to the request was provided to the applicant.

[12] The applicant's position is that they do not believe there are no records.

[13] I ordered that the correspondence with Dr. Maistrelli's clinic, evidencing the request and the response that there are no cnr's to produce (subject to redactions for privelege), be produced by the respondent to the applicant and myself, the following day at the hearing.

[14] This was indeed produced by the respondent, and I was satisfied that the respondent had fulfilled the order to the best of their ability. I allowed the evidence and testimony of Dr. Maistrelli.

Respondent's Motion:

[15] The respondent brought a motion to disqualify the applicant's witness, Dr. Bui, treating chiropractor, as an expert.

[16] After hearing the parties' submissions and hearing the examination of qualifying Dr. Bui as an expert, I found that Dr. Bui had proven that he has sufficiently been involved in the care of the applicant, for him to give an opinion that flows from his skills, knowledge and expertise. Therefore, I qualified Dr. Bui as a "participant expert" as per *Westerhof v. Gee Estate*[2]

ANALYSIS

Non-Earner Benefit

[17] In determining whether or not the applicant is entitled to a non-earner benefit ("NEB"), section 12 of the *Schedule* provides that he or she must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and not qualify for an income replacement benefit.

[18] *Heath v. Economical*[3] *("Heath"),* the leading case with respect to proving entitlement to a non-earner benefit, establishes that a claimant must be able to prove that he or she has been continuously prevented from engaging in "substantially all" activities in which they engaged in before the accident. In order to assess this, one must look at the applicant's pre and post-accident activities over a reasonable period of time before the accident.

[19] The onus is on the applicant to establish that he meets the test for entitlement to the non-earner benefit.

[20] The applicant provided minimal medical evidence in support of his claim for NEBs. The applicant did submit several disability certificates (OCF-3's) dated September 18, 2015, September 2, 2016, February 8, 2017 prepared by Dr. Bui, chiropractor and October 20, 2017 prepared by Mohit Rostogi, Physiotherapist, supporting entitlement to a non-earner benefit.

[21] At the hearing, Dr. Bui testified that he did not recall speaking to the applicant about his dependence on his partner to do his activities. He did recall asking the applicant about whether he was withdrawn from work or recreational activities and that the applicant said it's changed and that he's not the same. Dr. Bui testified that he did not note this down, whether in his notes or any report.

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[2] *Westerhof v. Gee Estate*, 2015 ONCA 206

[3] *Heath v. Economical*, 95 O.R. (3d) 785

[22] An Initial Social Work Assessment dated November 3, 2018 by Shayna Pilc, MSW RSW, was submitted by the applicant. Within her report, Ms. Pilc notes self-reported limitations by the applicant regarding his life pre and post- accident. The applicant reported a change in his social life, in his relationships with family and friends, in his ability to do recreational activities and household chores as well as difficulty at work.

[23] I find that these reported limitations lacked detail, particularly regarding the time period in which they apply or the activities most important to the applicant. There was no breakdown of each activity that he could do prior to the accident compared to the activities he could no longer do post-accident, which is the test he needs to satisfy.

[24] I also found the oral testimony of the applicant's pre and post-accident activities too general and lacking in detail.

[25] It is not enough for the applicant to demonstrate that he has sustained injuries and suffers from physical pain. What the applicant must show is that the injuries and associated pain have significantly interfered with almost all of his pre-accident daily activities. A detailed description of specific activities and how the accident has affected his ability to do them and during which time period is required for that analysis.

[26] The respondent relies on a Multidisciplinary Assessment, including an executive summary by Ms. Sora Smith, OT dated March 18, 2016, an Orthopaedic Assessment of Dr. Maistrelli, Orthopaedic Surgeon, dated March 8, 2016 and an In-Home assessment by Ms. Avi Kaplun, OT, dated February 24, 2016.

[27] The findings of the assessors is that based on the applicant's overall function, it is their opinion that he does not suffer a complete inability to carry on a normal life.

[28] I am inclined to comment on the extensive commentary made by the applicant in his closing submissions with respect to the lack of clinical notes and records from the respondent's expert assessments. The applicant spent a tremendous amount of his closing submissions stating that little to no weight should be placed on the respondent's expert opinions and findings, due to the lack of clinical notes and records being produced.

[29] I will begin by stating that I will not comment on whether it was incorrect of Dr. Maistrelli to destroy his notes after reviewing them and dictating the report. I will however state that the lack of clinical notes and records from an expert's assessment, in my opinion, does not automatically and necessarily equate to a

lack of reliability of this expert’s opinions and findings. There are many circumstances where an expert report will be produced in evidence to this Tribunal, without corresponding clinical notes and records being filed. In these circumstances, would it be a fair assumption to discredit the expert and their findings? I certainly would say not.

[30] Albeit, the clinical notes and records may potentially be of some aid to the Tribunal and to the applicant, however the lack of clinical notes and records certainly does not inherently lessen the weight of an expert, who has given reliable testimony at a hearing, with no reason provided to question their credibility.

[31] I must once again reiterate that the onus is on the applicant to establish that he meets the test for entitlement to the non-earner benefit. As such, I find that the applicant has not met his onus of proving on a balance of probabilities that he has suffered a complete inability to carry on a normal life as a result of the accident. Therefore, I do not find the applicant is entitled to a non-earner benefit.

Medical Benefits

[32] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical expenses that are reasonable and necessary as a result of the accident.

[33] The applicant bears the onus of proving on a balance of probabilities that the proposed treatment plans are reasonable and necessary.

[34] In an effort to remain consistent with the form in which the issues in dispute were outlined above, I will be referring to the treatment plans in dispute by their dates of submission, rather than the date on the OCF-18.

[35] During his testimony at the hearing, the applicant testified that the treatment he received for his injuries has been helpful to him and that it helps to manage his pain. He stated that he feels the pain has become permanent, although it is sometimes worse, while other times it is better.

[36] The applicant testified that after treatment he feels good and it becomes easier for him to do things he found difficult to do prior to the treatment. He stated that if not for the treatment he received, he would not be able to do anything he does.

[37] The applicant produced Dr. S. Bui, Chiropractor and Clinical Director at the treating clinics, as a witness at the hearing. Dr. Bui testified that he oversaw the applicant’s treatment each time he attended, although he may not have been physically at the clinic each visit.

[38] When questioned in chief regarding why he proposed the treatment plans in dispute (March 23, 2016 and October 23, 2016), Dr. Bui testified that the applicant "needed the treatment".

[39] In cross examination, Dr. Bui testified that the cnr's from the treating clinic show that the applicant's pain level was rated as 5/10 from the time of the accident up until the March 23, 2016 treatment plan. He testified that he continued to recommend the same treatment even though the applicant's pain level wasn't being reduced, in an effort to also improve the applicant's range of motion.

[40] Dr. Bui also testified that he felt the applicant's injuries had become chronic.

[41] Dr. Bui testified that for the October 23, 2017 treatment and assessment plan, he completed an assessment of chronic pain however did not document the assessment against three criteria of chronic pain (psychological status, pre-existing pain conditions and exaggerated response), listed in the British Journal of Anesthesia. Dr. Bui stated that he did not render a formal written report with his assessment of chronic pain, however in the cnr's of October 20, 2017, he notes chronic pain.

[42] With respect to the treatment plan submitted October 20, 2017 for a Disability Certificate (OCF-3), Dr. Bui testified that this was completed as an update on the applicant's disability status.

[43] Dr. Bui testified that three prior OCF-3's were completed and paid for by the respondent, dated September 19, 2015, September 2, 2016 and February 8, 2017.

[44] This OCF-3 was not requested by the respondent.

[45] The applicant submitted that this fourth OCF-3 was reasonable and necessary to keep the respondent apprised as to the applicant's condition and changes in the treatment program that the health practitioners may find reasonable.

[46] I find that the main change on this OCF-3, compared to the previous three, was an addition of "sprain and strain of cervical spine" to the list of injuries and a notation of neck pain under section 6.

[47] I do not find this to be a significant change in the applicant's condition which would warrant another OCF-3 within eight months of the previous one submitted.

[48] The applicant’s complaint of neck pain is documented in medical records prior to the date of this OCF-3, including the SOAP notes of Kennedy Care, as well as the respondent’s IE reports. This was not new information which the respondent was not aware of. As such, I do not find the submission of this OCF-3 reasonable nor do I find it necessary.

[49] The treatment plan in dispute submitted June 14, 2016, was proposed by another health practitioner from the facility.

[50] The respondent relies on an orthopaedic report dated May 9, 2016, by Dr. Maistrelli, to deny the treatment plans in dispute.

[51] In Dr. Maistrelli’s report, he opines that the applicant suffered uncomplicated soft tissue injuries to the neck and low back region and no neurological, findings were made in his examination. He also notes that there was no objective evidence of radiculopathy or myelopathy and that he found no substantive impairments from a musculoligamentous or neurologic perspective, as a result of the accident.

[52] Dr. Maistrelli found the OCF-18 of March 23, 2016 not reasonable and necessary, stating that in his opinion the recommended treatment will have no further rehabilitative benefit to the applicant and may reinforce pain focused behaviours and dependency. He opines that the applicant does not require any further facility-based treatments and he should continue self-directed exercise.

[53] The respondent relied on this report to deny the remainder of the treatment plans in dispute.

[54] The applicant provided very little evidence to establish his entitlement to the treatment in dispute.

[55] Although the proposed treatment plans, in of themselves, provide some support for further treatment, in this case, I do not find that these alone are sufficient. I do not find that the applicant has submitted any other persuasive evidence in support of these claims.

[56] I found the applicant’s testimony to be vague and failed to aid me in getting a clear understanding as to which treatment he found helpful and why.

[57] The applicant failed to provide any persuasive evidence and analysis as to why each individual treatment plan was reasonable and necessary.

[58] Based on the totality of the evidence before me, I find the applicant has not proven on a balance of probabilities the treatment plans in dispute are reasonable and necessary. Therefore, the treatment plans submitted on June 14, 2016, March 23, 2016 October 20, 2017 and October 23, 2017, are not payable.

INTEREST

[59] As I have found the benefits in dispute not payable, no interest is awarded.

Costs:

[60] The applicant sought their costs for this proceeding.

[61] The Tribunal has the authority to award costs to a party, under rule 19.1 of the *LAT Rules* as follows:

> (19.1) Where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatious[ly] or in bad faith, the party may request to the Tribunal for costs.

[62] The applicant submits that costs should be awarded to him, as the respondent acted in bad faith by not producing the clinical notes and records of their experts, which were requested prior to the hearing, and that the notes were destroyed by Dr. Maistrelli.

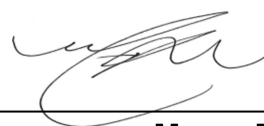
[63] I do not agree with the applicant's position. I do not see that the respondent's conduct amounted to behaviour in bad faith. The respondent discharged their duty of obtaining these records by requesting them and receiving a response advising there are no notes to produce. The applicant may not agree with this expert's practice in dealing with their cnr's from s. 44 assessments, however, this is not grounds to award costs in this circumstance.

[64] The threshold for awarding costs is a high one. In the case before me, I do not find the applicant's argument sufficient enough to meet the test. The circumstances are simply not enough to trigger an award for costs.

ORDER

[65] The application is dismissed.

Released: June 28, 2019



Meray Daoud
Adjudicator