LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Citation: M.M. vs. Aviva Insurance Canada, 2020 ONLAT 17-006475/AABS

Tribunal File Number: 17-006475/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:

M. M.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Victoria Tchilikova

For the Respondent: Ramandeep Pandher

Written Hearing: **January 27, 2020**

OVERVIEW

[1] M.M. was injured in an accident on **April 14, 2017** and sought medical benefits and an income replacement benefit ("IRB") from the respondent, Aviva. Aviva also denied several treatment plans submitted by M.M. on the basis that they were not reasonable and necessary. M.M. disagreed and applied to the Tribunal for resolution of the dispute.

[2] This written hearing was preceded by a preliminary issue decision, a change in applicant's counsel, numerous motions to include and exclude documentation and evidence, two adjournments, a hearing format change, an underlying dispute over s. 33 compliance and, seemingly, disagreement between the parties over the exact issues in dispute.

ISSUES TO BE DECIDED

[3] After some procedural wrangling, the following issues are in dispute:

i. Is the applicant entitled to receive a weekly income replacement benefit in the amount of $400.00 per week for the period of April 21, 2017 to April 14, 2019?

ii. Is the applicant entitled to a medical benefit in the amount of $1,477.19 for physiotherapy recommended by Eglinton West Therapy and Rehabilitation in a treatment plan (OCF-18) submitted on September 27, 2017, and denied October 5, 2016?

iii. Is the applicant entitled to a medical benefit in the amount of $507.50 for medical prescriptions recommended in a treatment plan (OCF-18) submitted on June 20, 2017, and denied July 10, 2017?

iv. Is the applicant entitled to an education expense in the amount of $929.00 recommended in a treatment plan submitted November 9, 2017?

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

vi. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payments to the applicant?

RESULT

[4] M.M. is not entitled to an IRB as she has not demonstrated a substantial inability to perform the essential tasks of her pre-accident employment for the period in dispute.

[5] I find M.M. is entitled to payment for the physiotherapy treatment in the amount of $1,477.19 and her dental expenses in the amount of $507.50 as they are reasonable and necessary. Interest is payable on these amounts.

[6] I find M.M. is not entitled to the cost of the accounting report as it was not identified as an issue in dispute, or her education expenses, as these items are not reasonable and necessary. I decline to order an award.

ANALYSIS

Preliminary Motion

[7] M.M. filed a "preliminary issues" motion with the Tribunal after receipt of Aviva's submission and prior to its own reply deadline. The record indicates submissions were heard by the Tribunal on February 4, 2020, with M.M. seeking an order to exclude over 20 paragraphs from Aviva's submissions, specifically excluding paragraph 23 of Aviva's submissions, Tab 12 of Aviva's submissions and an order for costs in the amount of $2,000 pursuant to Rule 19. Aviva requested its costs in the amount of $500. The Duty Adjudicator assigned the motion to this written hearing.

[8] While the Tribunal is alive to all of M.M.'s submissions, I decline to grant any of the relief requested by M.M. To ensure a full and fair hearing and to truly understand the context of this dispute, all of the evidence was admitted, considered and, in the grand scheme of the evidence, assigned whatever weight was determined to be reasonable.

The preliminary issue decision and s. 36

[9] In the preliminary issue decision that preceded this written hearing, Adjudicator Norris made two determinations: first, that M.M. had complied with Aviva's reasonable s. 33 requests on August 24, 2017 and was permitted to proceed to the Tribunal with her application; second, that Aviva's notice of an insurer's examination dated March 27, 2018 was not compliant with the *Schedule* because it was not clear whether M.M.'s attendance was required at the insurer's examination. In submissions, the parties revisit the decision at length.

[10] M.M. submits that she complied with all of the requirements of the *Schedule* when she applied for IRB. She argues that Aviva did not comply with its requirements under s. 36(5) of the *Schedule* after requesting information under s. 33 because it never issued a clear and unequivocal denial and did not immediately request a s. 44 examination. In response, Aviva argues that despite its repeated requests for production of pay stubs and other information required to determine eligibility and calculate quantum of her IRB, M.M. only complied fully with the s. 33 requests after the release of the preliminary issue decision finding that she complied. Aviva argues that this delay put it at a disadvantage because not only was it in receipt of new documentation, but it could no longer seek reconsideration of the Tribunal's decision.

[11] In addition, Aviva argues that M.M.'s framing of the timing of her application and its denials of same is misleading and incorrect. It points to the date of M.M.'s accident (April 14, 2017), the date her application was actually received (May 19, 2017) and the date it responded requesting additional documentation under s. 33 (June 1, 2017). It argues that the documentation it reasonably requested was not received until February 2018, long after M.M. had been notified of the s. 33 requests and attended an examination under oath. Further, Aviva argues that M.M. limited her claim to March 2018 during the case conference in October 2019, where she conceded that she returned to full-time work at that time.

[12] Aviva submits that it then denied the IRB on June 4, 2018 after M.M. did not attend a s. 44 IE and following a paper review of the new documentation. It argues that M.M. was non-compliant with its reasonable requests under s. 33 and any claims for IRB prior to her application being submitted (the period from the accident to May 19, 2017) or after she returned to work in January 2018 and up to the date of denial are not payable and that its decision to suspend IRB while awaiting s. 33 documentation was reasonable and did not trigger s. 36, despite the decision of Adjudicator Norris. Further, it alleges that it only received the requested post-accident income pay-stubs from M.M. six months after the preliminary issue decision was released, which gives rise to its new argument on s. 33. M.M. maintains that she complied with all s. 33 requests and has yet to receive a proper denial, making IRB payable under s. 36(4).

[13] To begin, I cannot interfere with the decision of Adjudicator Norris on the two preliminary issues and the opportunity for Aviva to request reconsideration of that decision has long passed. I disagree with the Tribunal's finding that M.M. complied with Aviva's "reasonable" s. 33 requests on August 24, 2017, because it failed to consider that M.M. never submitted her post-accident pay stubs until

after the preliminary issue decision was released, despite Aviva's requests. I consider these post-accident paystubs to be a very relevant and reasonable request where an insured is claiming IRB and earned post-accident income after a return to work, however brief. Based on the timeline presented by Aviva, I find it entirely reasonable that it continued to seek out additional information between M.M.'s s. 33 compliance of August 24, 2017 and its IRB denial of July 4, 2018 because it turns out that information was missing during this time. Indeed, while the overall delay between s. 33 compliance and denial is not ideal, I do not find that Aviva was ignoring the claim or intentionally delaying payment during this time. Rather, it scheduled an EOB, various s. 44 examinations, made further s. 33 requests, received an updated OCF-2 from M.M. and then conducted a paper review when it received even more documentation in February 2018.

[14] Second, I find M.M. complied with the basic requirements of the *Schedule* when she applied for IRB, although I find it troubling that post-accident pay stubs were only submitted following the preliminary issue decision. Third, I find nothing in the evidence to substantiate M.M.'s claim that Aviva failed to comply with its obligations under s. 36(6) because it scheduled s. 44 examinations and made further s. 33 requests. Similarly, I do not find that the reasons provided—"the disability period appears to be inconsistent with the diagnosis of mechanism of injury"—while tenuous, are defective. Fourth, I find no indication that M.M. limited her claim for IRB to a certain time period as Aviva alleges. Finally, I agree that the IRB was properly denied by Aviva on July 4, 2018.

Is M.M. entitled to payment for the IRB for the period in dispute?

[15] I find that M.M. is not entitled to an IRB for the period in dispute, as she has not met her burden to prove that she suffered from a substantial inability to perform the essential tasks of her employment during the period in dispute.

[16] Entitlement to an IRB falls under s. 5(1)(1)(i) of the *Schedule*: an IRB is payable if the insured was working at the time of the accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. This inquiry is divided into two steps: 1) what are the essential tasks of the insured's pre-accident employment; and, 2) is the insured substantially unable, as a result of the accident, to perform those tasks? The onus to prove entitlement rests with M.M.

[17] At the time of the accident, M.M. was employed as a full-time manager at a convenience store. Her responsibilities were to schedule staff, deal with supplier's accounts, order and receive merchandise, conduct returns/exchanges

of merchandise, inventory, closing/sales deposits daily, deal with franchise representatives and customer service. M.M. argues that as a result of her impairments—chiefly dental and physical injuries to her neck, back, right elbow and right knee, concussion, headaches and psychological diagnoses of adjustment disorder with anxiety and depression, non-organic sleep disorder and chronic and specific phobias, situation type (vehicle)—she could not complete the essential tasks of her employment and could not return to work until January 2018, and only on a part-time basis at that point due to financial need.[1] She relies on an OCF-3 dated May 8, 2017 from Dr. Larga, the psychological diagnoses of Dr. Flax, the clinical notes and records of her family physician, Dr. Chen, and letters from her employer to prove that she meets the IRB test under s. 5. Finally, she argues that the Tribunal has held that an IRB can be payable where an insured returned to part-time or modified duties but not full-time employment.

[18] In response, Aviva argues that M.M. returned to work on January 8, 2018, so her claim that she suffered a substantial inability to perform the essential tasks of her employment within 104 weeks of the accident is not credible, as she admits returning to work within eight months. Aviva argues that M.M.'s claim lacks credibility and relies on surveillance from October and November 2017 and February 2018 showing M.M. driving her vehicle alone, servicing customers at the store, using the register, stocking shelves and, it argues, not exhibiting physical or psychological impairments that prevented her from working. Aviva argues that M.M. has not provided paystubs or income information for these periods even though she claimed at her examination under oath that she was not working.

[19] I agree with Aviva. The onus to prove entitlement to an IRB rests with M.M. and I find, on the evidence, that she has not met her burden to prove that she suffered a substantial inability to perform her pre-accident job tasks as a result of the accident for the period in dispute. While the Tribunal is hesitant to assess credibility in a written hearing without the benefit of *viva voce* evidence, the inconsistencies in M.M.'s IRB claim about her ability to complete the essential tasks of her work and, more concerning, when she was able to return to work, were difficult to overlook.

[20] To M.M.'s credit, she admits returning to her employment at the convenience store in January 2018 on a part-time basis due to financial need. She argues

[1] On Dr. Chen's advice, M.M. allegedly returned to work in January 2018 for 3-4 days per week at 4 hours per day in an administrative capacity. As of September 2018, M.M. was allegedly only working 12 hours per week.

that her return was on modified duties and in a new capacity, as her role changed from Manager to Administrative Assistant, a change which is reflected in her resume and in her letter from her supervisor, who also happens to be her spouse. I find this evidence is not a particularly convincing indication of her change in job duties as a result of functional limitation from the accident, as alleged. On review of the terms of reference and resume, which M.M. created and therefore had the ability to highlight the difference in employment tasks, the tasks identified are largely similar and do not reflect the type of physical requirements that M.M. outlines in submissions, despite the eight-month gap between job titles where M.M. claims she had a substantial inability to complete her essential work tasks.

[21] What I found most problematic for M.M.'s claim is the existence of surveillance evidence from October and November 2017, showing M.M. at the convenience store servicing customers, moving around, using the register, stocking shelves and driving her vehicle, which contradicts the medical evidence before the Tribunal that she was unable to work. To be frank, M.M. is doing many routine things that I suspect are common to convenience store employees and I agree with M.M. that surveillance is a brief snapshot in time that does not necessarily capture the pain or psychological impairments that she is experiencing while working. In my view, it is unfair to say that since M.M. is not grimacing in pain or using assistive devices while working at the store, that she should not be believed. She may very well be experiencing some pain while standing for extended periods. She may very well have a headache or be struggling with anxiety while at the store. The surveillance does not capture internal struggle and there is no sound.

[22] However, in my view, what the footage does illuminate is M.M.'s seeming ability to do many, if not all, of the routine tasks identified in her resume and what she claims she could not do in her self-reporting to various assessors, like servicing customers, driving, squatting, standing for long periods, *etc*. Further—and perhaps most troubling when it comes to credibility—the surveillance illuminates the fact that M.M. was able to perform these essential tasks on her own, at the earliest, in October 2017, which is three months before she claims she was able to return to work in January 2018 on modified duties and quite early in the 104-week entitlement period. In submissions, M.M. does not offer an explanation as to why or how she was able to work during this period of alleged functional limitation, instead focusing on how the footage does not adequately capture her struggle. The letter from her supervisor/spouse states that she was merely visiting the store and not working. The footage is not particularly damning, but as the trier of fact, I found it difficult to reconcile M.M.'s claim that she suffered a

substantial inability to perform her essential work tasks as a result of the accident during this period, as either a Manager or Administrative Assistant, with the footage before the Tribunal.

[23] In my view, the existence of this footage, in turn, undermines the medical opinions on which M.M. relies, such as the note of Dr. Chen from November 2017 stating that M.M. is unable to work or his note from January 2018 stating that M.M. can only return on part-time modified duties, or Dr. Weiner's diagnosis of driving specific phobia and anxiety. On this basis, I prefer the s. 44 findings of Dr. Tu, who found that there was no musculoskeletal impairment that would preclude M.M. from her pre-accident employment tasks, which she confirmed in her addendum report after viewing the surveillance. As there was evidence of post-concussion symptoms, Dr. Tu deferred any neurological findings to a specialist. Notably, M.M.'s neurologist, Dr. Roussev, did not identify any neurological impairment and found no functional impairment or inability to work. I find these opinions are consistent with the evidence.

[24] Finally, in submissions, M.M. claimed entitlement to the cost of the accounting report she had completed in order to calculate her IRB quantum. She argues this report was reasonable and necessary because of the complexities of the calculation and that she was both employed and self-employed. Aviva disputes this claim, arguing that it was never agreed that the report would be an issue in dispute, and it is not listed in any of the Orders from the Tribunal as being in dispute. Further, Aviva expresses confusion over M.M.'s claim that she was also self-employed pre-accident, as it never received any indication that M.M. was a "project coordinator" since 2016, as alleged in the report. It argues that the report is another example of the lack of credibility in M.M.'s claim. I agree. First, the report is not listed as an issue in dispute and was only raised in submissions. Second, as Aviva suggests, the report appears to raise new issues in M.M.'s claim for IRB and that she had a substantial inability to work because it claims that she earned income during the entire period of her claim and was self-employed previously. I do not find that Aviva should bear the cost of the report.

[25] For the reasons above, I find that M.M. has not demonstrated that she suffered from a substantial inability to perform the essential tasks of her employment during the period in dispute. Accordingly, I find she is not entitled to the IRB for this period.

Are the rehabilitation benefits reasonable and necessary?

[26] Section 14 of the *Schedule* provides that an insurer is liable to pay for medical and rehabilitation benefits that are reasonable and necessary as a result of an accident. M.M. bears the onus of proving on a balance of probabilities that each treatment and assessment plan is reasonable and necessary.

$1,477.19 for physiotherapy

[27] I find M.M. is entitled to the medical benefit in the amount of $1,477.19 for physiotherapy as it was reasonable and necessary and incurred.

[28] According to the treatment records, M.M. attended for treatment between May 2017 and February 2018 and improvement in pain reduction and range of motion is noted as result in the clinic records, the clinical notes of Dr. Chen and M.M.'s self-reporting. M.M. argues that the treatment was reasonable and necessary because recommendations for physiotherapy came form various assessors, pain reduction is a legitimate goal for treatment and her function was improving because of the treatment. In response, Aviva contends that the OCF-18 was submitted in September 2017, just prior to the surveillance it conducted. Aviva argues that in October and November 2017—when M.M. purportedly required physiotherapy for her pain and range of motion issues—she is seen working and exhibiting normal range of motion. It argues that further facility-based treatment is not reasonable and necessary to get M.M. back to her pre-accident function, because the surveillance confirms her function was not affected.

[29] I agree with M.M. I find it clear on the evidence that the goals identified in the OCF-18 were being met by the treatment, that M.M. attended regularly and incurred the costs despite the denial and was deriving benefit from the physiotherapy, as she reported a 50% improvement. As the cost of the treatment was reasonable and her attendance at physiotherapy was consistently supported by Dr. Chen to relieve her pain and increase her function, I find it reasonable to afford M.M. more treatment in order to increase improvement. While Aviva argues that her function and range of motion were fine in the months following the treatment plan, I find it just as likely that her function and range of motion was improving as a result of the treatment she was receiving over the previous six months, which was allowing M.M. to return to work. On this basis, I find that M.M. was benefitting from treatment and therefore find it reasonable and necessary to continue providing treatment to work towards her maximal recovery.

$507.50 for medical expenses

[30] M.M. submits that she is entitled to payment for various medical and dental expenses submitted via an OCF-6 because but for the accident, she would not have incurred these expenses. The dental expenses are identified as $142.00 for a dental examination by Dr. Botelho, $150.00 for an examination by Dr. Da Costa, $150.00 for an examination by Dr. Mendes and $20.50 for medication prescribed by Dr. Botelho. M.M. also claims entitlement to payment for $45.00 for an ambulance that she called when she was experiencing headaches and her family doctor's office was closed. In response, Aviva submits that the ambulance costs have already been paid and are no longer in dispute. As for the remaining dental claims, Aviva asked for more information about the expenses on July 10, 2017. Aviva alleges M.M. furnished reports from the dentists speaking to her "occlusion, gingiva and treatment" with none of the reports connecting the treatment to the accident. Further, Aviva submits that proof of payment of these expenses was not even submitted to it until it received M.M.'s submissions for this written hearing, despite the OCF-6 being submitted in 2017.

[31] I agree with M.M. On review of the evidence, M.M. reported to the dentists that she hit her teeth in the accident and that swelling was noted post-accident. The proximity of her visits to the accident suggests M.M.'s dental claims are related to the accident, with the exception of gingivitis. Aviva requested further information from M.M. and, contrary to Aviva's claims, the dentists do seem to connect M.M.'s visits to the accident. Further, I find M.M. provided proof that these assessments were incurred. Accordingly, I find M.M. is entitled to payment for the dental expenses.

$929.80 for education expenses

[32] M.M. submits that she is entitled to payment for $929.00 in lost education expenses submitted via an OCF-6 because she was unable to complete her continuing education course at [an educational institution] due to her accident-related impairments. Specifically, she argues that she received an inadequate grade of 38% in her part-time Financial & Management Accounting course after incurring the tuition ($745) and materials costs ($184.80) due to the accident and was forced to redo the course in 2018 in order to obtain an adequate grade. In response, Aviva submits that there is no evidence before the Tribunal that M.M. was unable to pass the course due to the accident and that M.M. never sought a medical note excusing her from writing her exam due to her impairments.

[33] I agree with Aviva. M.M. has not met her onus to prove that she was unable to complete her course as a result of the accident. On review of the medical records, there is no indication that M.M. advised any of her treating practitioners that she would be unable to complete her studies or requested accommodations from [an educational institution] due to her accident-related impairments preventing her from participating in the course or writing her final exam, as alleged. Accordingly, I find M.M. is not entitled to payment for lost education expenses as a result of the accident.

Award

[34] M.M. seeks payment of an award under s. 10 of O. Reg. 664 on the basis that Aviva unreasonably withheld payment of benefits she was entitled to and this caused further financial and psychological distress. I disagree. I find an award is not appropriate given my findings above. There is no indication that Aviva unreasonably withheld or delayed payment of benefits where there was also not a genuine dispute over entitlement.

Interest

[35] M.M. is entitled to interest on overdue benefits, pursuant to s. 51.

CONCLUSION

[36] For these reasons, I find M.M. is not entitled to an IRB as she has not demonstrated a substantial inability to perform the essential tasks of her pre-accident employment for the period in dispute.

[37] I find M.M. is entitled to payment for the physiotherapy treatment in the amount of $1,477.19 and her dental expenses in the amount of $507.50 as they are reasonable and necessary. Interest is payable on these amounts.

[38] I find M.M. is not entitled to the cost of the accounting report or her education expenses, as these items are not reasonable and necessary. I decline to order an award.

Released: March 18, 2020

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Jesse A. Boyce
Adjudicator