Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Ontario

Citation: Subaskaran. v. RSA Insurance, 2021 ONLAT 20-000368/AABS

Release date: 06/16/2021
File Number: 20-000368/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:

Ponnadurai Subaskaran

Applicant

and

RSA Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avril A. Farlam**

APPEARANCES:

For the Applicant: Ponnadurai Subaskaran, Paralegal

For the Respondent: M. Jennifer Cosentino, Counsel

HEARD by Videoconference: and written submissions

OVERVIEW

[1] Ponnadurai Subaskaran ("applicant") was involved in an automobile accident on April 24, 2018 ("accident"). The applicant sought benefits from RSA Insurance ("respondent") pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (the "Schedule").*[1]

[2] The respondent paid income replacement benefits ("IRB") of $400.00 per week to the applicant until October 6, 2019 when it determined the applicant had returned to work.

[3] The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal") for dispute resolution on January 17, 2020.

[4] The respondent seeks repayment of $9,028.00 of IRB for the period May 2, 2019 to October 6, 2019 on the basis that the applicant returned to work in May 2019.

[5] Both parties filed written submissions for this hearing. In addition, the applicant was cross-examined on May 27, 2021 at a video conference hearing.

ISSUES

[6] The issues to be decided in this hearing are:

a. **Respondent's issue**:

i. Is the respondent entitled to a repayment of $9,028.00 relating to its payment of IRB from the period of May 2, 2019 to October 6, 2019?

b. **Applicant's issues**:[2]

i. Is the applicant entitled to $2,071.60 for chiropractic services, recommended by GTA Chiropractic in a treatment plan dated March 20, 2019?

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

RESULT

[1] O. Reg. 34/10.
[2] Prior to the hearing, the applicant withdrew the issue described in paragraph 4 (1) of the Tribunal's case conference Order made July 20, 2020 by letter sent to the Tribunal dated April 16, 2021.

[7] The respondent is entitled to repayment from the applicant for IRB in the amount of $9,028.00 plus interest under subsection 52 (5).

[8] The applicant is not entitled to $2,071.80 for the disputed chiropractic treatment plan. No interest is payable to the applicant.

LAW

[9] Subsection 52(1)(a) of the *Schedule* provides that a person is liable to repay to the insurer any benefit paid as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud. Subsection 52(2)(a) provides that the insurer shall give person notice of the amount required to be repaid. Subsection 52(3) provides for a 12-month limitation unless the amount was originally paid as a result of wilful misrepresentation or fraud. Interest is provided for in subsection 52(5).

[10] Section 53 permits an insurer to terminate the payment of benefits to or on behalf of an insured if the insured person has wilfully misrepresented material facts relating to the application for benefits provided notice is given which sets out the reason for termination.

[11] The onus is on the insurer to prove that the benefit was overpaid on a balance of probabilities.

[12] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant has the onus of proving on a balance of probabilities that the benefits he or she seeks are reasonable and necessary.

ANALYSIS

Is the respondent entitled to a repayment of $9,028.00 relating to its payment of IRB from the period of May 2, 2019 to October 6, 2019?

[13] After considering all of the evidence, submissions and case law put forward by the parties, I find that the respondent has met its burden to prove on a balance of probabilities that it overpaid IRB to the applicant in error as a result of the applicant's wilful misrepresentation of his return to work status. The following are my reasons.

[14] The applicant admitted in his cross-examination that he was working as a taxi driver in May, June, July, August and September 2019. The applicant identified himself in the surveillance videos from May 2, 2019 and subsequent dates which

showed him driving a commercial taxi vehicle on multiple days, picking up multiple customers in a day, sometimes helping customers unload their packages from the taxi and receiving payment from the customers for this work.

[15] The applicant also admitted that he did not tell his family physician Dr. Jeu that he was working as a taxicab driver starting in May 2019, even though he saw Dr. Jeu twice during these months as substantiated by Dr. Jeu's records in May and August 2019.

[16] The applicant admitted that he did not tell his physiotherapist Arun Haridas that he was working as a taxi cab driver starting in May, 2019, even though Arun Haridas signed an OCF-3, disability certificate, dated July 26, 2019 certifying that the applicant is substantially unable to perform the essential tasks of his employment at the time of the accident as a result of and within 104 weeks of the accident.

[17] The applicant admitted that he did not tell respondent's orthopaedic surgeon Dr. Osinga during his July 2019 assessment that he was working as a taxicab driver starting in May 2019. Dr. Osinga's August 2019 report records that the applicant told him the opposite, specifically, "he states he has not returned to driving professionally …he had driven a taxi, last working on April 24, 2018…he has not returned to work."

[18] The applicant admitted that he did not tell his legal representative that he was working as a taxicab driver until September 2019, which is consistent with the September 24, 2019 letter to the respondent advising of the applicant's return to work for four to five hours per day. The applicant said he considered four to five hours per day to be full time work as a taxi driver.

[19] The applicant certified in an OCF-13, Declaration of Post-Accident Income and Benefits signed August 2, 2019 that he had not received any employment or self employment income. The applicant admitted in his cross-examination that before signing this Declaration he read and understood the information he provided had to be true and correct and understood it is an offence to knowingly make a false or misleading statement to the respondent. The applicant's legal representative did not object to this questioning during the applicant's cross-examination but, does submit in written reply submissions that the use of this form has been discontinued and although the applicant completed it, it cannot be evidence at this hearing. Because it was filed as an exhibit at his cross-examination and the applicant was cross-examined on the Declaration without objection, the Declaration is part of the evidentiary record before me. However, I accept the

applicant's submission that he should not have been asked to complete this Declaration which is no longer in use and therefore I give it no weight.

[20] The applicant admitted that he received $400.00 per week for IRB and understood that he received this cheque because he told the respondent he could not work as a taxi driver and the respondent was under that impression after May 1, 2019. The applicant said he understood that he had to tell the respondent if he returned to work and made money because this could affect the quantum of IRB he was receiving. The applicant continued to accept weekly IRB payments of $400.00 after May 1, 2019.

[21] The applicant said that he did not keep records of the hours that he worked in May through August 2019 as he did pre-accident because it was only a few hours a day that he was working.

[22] There is no evidence before me that the applicant communicated directly with the respondent that he was working as a taxicab driver starting in May 2019.

[23] I find unpersuasive the applicant's testimony that he was not working full time after May 1, 2019 but only "trying" to return to work as a taxi driver and because he only made "$20.00, $30.00, $40.00 or $50.00." he did not consider these amounts to be income. The obligation to inform the respondent is not dependent on the subjective viewpoint of the applicant. Further, I accept the respondent's submission that the *Schedule* does not distinguish between small and large amounts of income regarding the obligation to disclose earnings. I do not accept the applicant's evidence that working as a taxi driver in May through September 2019 for multiple hours per day and on many days constitutes a work trial in the absence of medical evidence documented at the time from physicians or other qualified health practitioners who were made aware of his return to work.

[24] Given that the applicant did not keep any records of hours of work or his earnings from working as a taxi driver from May to September, 2019, the best evidence before me that the applicant was working and being paid by customers for his work is the admission by the applicant that he was working as a taxi driver after May 1, 2019 and the respondent's surveillance which demonstrates that the applicant picked up multiple customers in his taxi over a period of several hours or more on multiple days. The applicant had a clear duty to advise the respondent that he had returned to work and made no attempt to do so, continuing instead to give the impression he was not working.

[25] The Tribunal has stated before that misrepresentation is "any manifestation by words or other conduct by one person to another that, under the circumstances,

amounts to an assertion not in accordance with the facts" and that a "silence or failure to report facts" can amount to wilful misrepresentation.[3]

[26] I find that the applicant wilfully misrepresented his work status while continuing to collect IRB even though no longer eligible under sections 5 and 37(2)(e) of the *Schedule*. Here, I find that by keeping the fact that he had returned to work in May 2019 from his family physician, his legal representative, his physical therapist, the respondent's physician and by putting forward misleading and misrepresentative documentation indicating he had not returned to work, the applicant misrepresented his true work status to the respondent.

[27] Although the applicant relies on a letter from Able Atlantic Taxi dated March 13, 2020 indicating that the applicant worked two days per week in May, June and July, 2019, I find that this is not credible evidence given the applicant's admissions during his cross-examination, the respondent's surveillance and given that the taxi company representative did not attend the hearing even though summonsed to do so.

[28] The applicant's argument that he was working to mitigate his damages as allowed by section 11 of the *Schedule* is also unpersuasive. The applicant had no "damages" to mitigate given that he was receiving IRB in May through September 2019. Further, nothing in section 11 relieves the applicant of his duty to report his return to work.

[29] I also find that the respondent gave the required subsection 52(2)(a) notice by correspondence dated March 5, 2020. As a result, I also find that the applicant is liable to repay to the respondent $9,028,99 for the period May 2, 2019 to October 6, 2019 plus interest pursuant to subsection 52(5).

Is the Applicant Entitled to $2,071.80 for Chiropractic Services?

[30] This treatment plan prepared by Dr. Haralabos Grigoropoulos, applicant's chiropractor, dated March 20, 2019 proposes over a five-week period therapies consisting of ten manipulation sessions by Dr. Grigoropoulos for $1128.10, five massage therapy sessions for $145.50 and eight physiotherapy sessions for $798.00 totalling $2,017.60.

[3] For example, see: *Aviva General Insurance Company v. Muthusamythevar,* 2020 CanLII 94791 (ON LAT) at para. 9.

[31] I find that the applicant is not entitled to this disputed treatment plan because the applicant has not provided sufficient evidence to meet his burden of proof that it is reasonable and necessary to treat injuries arising from the accident.

[32] There is little support for this disputed treatment plan from Dr. Jeu in her records. Although she indicates the applicant still needs physiotherapy in February 2019, it is clear from the applicant's testimony that he was not always truthful with Dr. Jeu. On May 21, 2019, Dr. Jeu records the applicant is experiencing pain. However, the applicant admitted he did not tell her he was working at that time.

[33] There is little evidence as to how the proposed treatment will achieve its goals or evidence establishing that the proposed treatment is reasonable and necessary as a result of injuries suffered in the accident, or that the overall cost is reasonable and necessary except from Dr. Girgoropoulos, the author of the disputed treatment plan. It is well established that a treatment plan, without more, is not sufficient evidence to establish an applicant's entitlement on the basis of reasonableness and necessity.

[34] I find unpersuasive the applicant's submission that the respondent did not comply with subsection 38(8) of the *Schedule* and that it's response to this treatment plan was vague and confusing. Subsection 38(8) requires an insurer within 10 business days to notify the applicant of the services in the treatment plan that the insurer does not agree to pay for and give the medical and other reasons it considers the services not to be reasonable and necessary.

[35] Having reviewed the correspondence from the respondent in the explanations of benefits ("EOB"), I am satisfied that they meet the requirements of subsection 38 (8). This treatment plan was submitted May 21, 2019 and was denied June 3, 2019. This denial was sent within 10 business days after the respondent received the treatment plan, identified the services in the treatment plan that the respondent did not agree to pay for and gave the medical and other reasons why the respondent considers the treatment plan not to be reasonable and necessary.

Applicant's Claim for Interest

[36] As no benefits are payable to the applicant, no interest is payable.

ORDER

[37] For the reasons outlined above, the respondent is entitled to repayment from the applicant for IRB in the amount of $9,028.00 plus interest under subsection 52 (5).

[38] The applicant is not entitled to $2,071.80 for the disputed chiropractic treatment plan. No interest is payable to the applicant.

Date of Issue: June 17, 2021

Avril A. Farlam, Vice Chair