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

2020 CanLII 37658 (ON LAT)

Citation: R.E. vs Aviva Insurance Company ONLAT 2020, 19-000303/AABS

Released date: May 11, 2020
Tribunal File Number: 19-000303/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:

R.E.

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Marc Golding

For the Respondent: Geoffrey L. Keating

Heard via written submissions

OVERVIEW

[1] R.E. was injured in an automobile accident on July 19, 2016 and sought various benefits and an income replacement benefit ("IRB") from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*). Aviva denied the IRB on the basis that s. 44 assessments determined he was not substantially unable to perform his essential work tasks and because he had not declared any income in order to calculate an IRB under s. 4(5) of the *Schedule*. Aviva denied the benefits because it determined that R.E.'s injuries were predominately minor and therefore subject to treatment within the Minor Injury Guideline ("MIG"). R.E. disagreed and applied to the Tribunal for resolution of the dispute.

ISSUES TO BE DECIDED

[2] The following issues are to be decided according to the Case Conference Order:

i. Is the applicant entitled to an IRB in the amount of $400.00 weekly from July 26, 2016 to date and ongoing?

ii. Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?

iii. Is the applicant entitled to a medical benefit in the amount of $425.62 ($1,300.49 less $874.86 approved) for chiropractic services recommended by Galatea Medical in a treatment plan (OCF-18) submitted on October 26, 2016 and denied on January 16, 2017?

iv. Is the applicant entitled to a medical benefit in the amount of $2,637.33 for chiropractic services recommended by Galatea Medical in an OCF-18 submitted on January 23, 2017 and denied on January 24, 2017?
Is the applicant entitled to a medical benefit in the amount of $1,767.16 for chiropractic services recommended by Galatea Medical in an OCF-18 submitted on March 21, 2017?

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

[1] O. Reg. 34/10.

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RESULT

[3] I find R.E. is not entitled to payment for an IRB as he has not demonstrated a substantial inability to perform the essential tasks of his pre-accident employment and has not furnished evidence that his income qualifies under s. 4(5).

[4] I find R.E. sustained predominantly minor injuries as defined by the *Schedule* that are properly treated within the MIG. On the evidence, I find he has not met his burden to prove that the treatment plans in dispute are reasonable and necessary.

ANALYSIS

Income Replacement Benefit

[5] Entitlement to an IRB falls under s. 5(1)(1)(i) of the *Schedule* and is payable only if a self-employed insured person suffers, as a result of and within 104 weeks after the accident, a substantial inability to perform the essential tasks of their self-employment. Under s. 4(5), an insured person is required to report their pre-accident income to the CRA under the *Income Tax Act* in order for it to be used to quantify income replacement benefits payable. I find R.E. is not entitled to an IRB.

[6] Against these requirements, R.E. submits that as a result of the accident he is unable to perform the essential tasks of his employment as a landscaper/forklift operator, which constitutes standing, walking, sitting, lifting, reaching, carrying, bending, kneeling, crouching, *etc.* and states that because he returned on modified duties and on limited hours, that IRB is payable. He relies on a note from his family physician and the s. 44 IE multi-disciplinary report prepared by Aviva as evidence of his functional limitations as well as Tribunal case law to support his arguments.

[7] In response, Aviva submits that the information on file with respect to R.E.'s pre-accident work is extremely limited. It states that it has received one OCF-2 to date in relation to R.E.'s reported self-employment with [the landscaping /cleaning company]. The OCF-2 indicates that the Applicant earned $2,000 net in the four weeks pre-accident and that he worked from February 1, 2015 to August 12, 2016, as a general labourer, and last worked on July 20, 2016. Aviva submits that despite repeated requests for more information, it has not received anything and R.E. self-reported to the IE assessors that he returned to landscaping work as of September 2016. Further, Aviva submits that R.E.'s

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2015 income tax return notes T4 income of $2,816 and social assistance payments of $7,549 and that no business income was reported in 2015. Specifically, Aviva submits that the 2015 income tax return does not suggest weekly earnings of $650 per week, does not suggest that R.E. had been self employed as of February 1, 2015, and suggests that, for a large period of 2015, R.E.'s financial situation was dire enough to necessitate the provision of social assistance benefits. Aviva also relies on a letter from the CRA confirming that R.E. did not file income tax for 2016. All of this aside, Aviva submits that the s. 44 multidisciplinary IE report it commissioned confirmed, contrary to R.E.'s submissions, that he did not meet the test for entitlement to IRB.

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[8] I agree with Aviva and follow its submissions completely. I find R.E. makes no reference to any medical evidence confirming that he is incapable of performing the essential tasks of his pre-accident work, aside from relying on Aviva's s. 44 IE reports, which are unhelpful to him because they determined that he does not meet the IRB test and are uncontroverted by any other medical opinion. Indeed, more problematically, in his submissions, R.E. does not even identify for the Tribunal what his pre-accident employment constituted, how many hours he worked per week or what his tasks were. There is no comparison of his pre- and post-accident abilities or what his alleged modified work entailed and why he is substantially unable to perform. The Tribunal was forced to glean all of this information from Aviva's submissions and it remains unclear why R.E. believes he meets the IRB test, let alone why his evidence should be preferred over the s. 44 IE physician and functional abilities evaluations that found he did not meet the test.

[9] I also find R.E. has failed in his onus to produce any financial documentation relating to his self-employment at [the cleaning company], despite requests made by Aviva and its accounting firm and the fact that it is R.E.'s burden to prove entitlement under s. 5(1)(1)(i). The sole piece of financial documentation in evidence is an OCF-2, which was not included in R.E.'s submissions, but produced by Aviva. I agree with Aviva that even if R.E. were to be found to be entitled to IRB, which is not the case here, the quantum of benefits payable to the two-year mark would be zero based on R.E.'s lack of income verification and because only income which has been reported to the CRA under the *Income Tax Act* can be used to calculate IRB entitlement under s. 4(5). Since the OCF-2 in evidence notes that R.E. only earned income in 2016 and the CRA letter confirmed that an income tax return has not been filed for 2016, I find the income listed in the OCF-2 cannot be relied upon to quantify IRB payable. As R.E. has failed to identify any other sources of income in the year pre-accident, his IRB claim must fail.

Applicability of the MIG

[10] The MIG establishes a framework for the treatment of minor injuries, as defined in s. 3(1) of the *Schedule*. Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to $3,500, although an applicant may escape the MIG under s. 18(2) if they can demonstrate a pre-existing condition documented by a health practitioner prevents maximal medical recovery. The applicant must establish entitlement to coverage beyond the $3,500 cap on a balance of probabilities. I find the medical evidence indicates that R.E. suffered predominately minor physical injuries as a result of the accident that are treatable within the MIG.

[11] The medical evidence on which R.E. relies to prove that his injuries are not minor is incredibly underwhelming and falls well short of meeting his burden. First, R.E. submits that his injuries are not minor based on his report of severe back pain, rated as 10/10, to his family physician, Dr. Laftah. On review of the clinical notes, while there is a mention of “had MVA”, there is no notation of “severe back pain” or a 10/10 rating, as alleged and no referrals. Next, R.E. argues that a July 20, 2016 cervical spine x-ray report, showing evidence of slight degenerative changes, should remove him from the MIG. On review of the report, the overall impression noted was “normal” and R.E. has offered no evidence to establish that the slight degenerative changes that are noted in the report were caused by the accident. Finally, R.E. submits that a 2015 x-ray of his lumbar spine, documented only in his OHIP summary, is evidence of a pre-existing condition necessitating removal from the MIG. The x-ray report is, unfortunately, not in evidence, so the Tribunal cannot determine whether R.E. sustained the injury or if it was exacerbated by the accident. In any event, I agree with Aviva that an x-ray notation from an OHIP summary is not the type of documentation by a health practitioner contemplated by s. 18(2) to warrant removal from the MIG for a pre-existing condition.

[12] Accordingly, the only relevant medical evidence before the Tribunal is the s. 44 multidisciplinary IE report provided by Aviva, dated January 3, 2017. In the report, both Dr. Hanna, physician, and Mr. Yip, who conducted the functional abilities/job evaluation, concluded that R.E.’s accident-related injuries are soft tissue in nature and fall within the definition of minor under the *Schedule* and that he was not prevented from completing the tasks of his employment. As R.E. has provided no credible evidence to refute this finding, or compelling evidence of a pre-existing condition or chronic pain preventing maximal recovery, I have no basis to interfere with Aviva’s determination that his injuries are properly within the MIG.

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Are the medical and rehabilitation benefits reasonable and necessary?

[13] Under s. 15 of the *Schedule*, an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an applicant as a result of an accident. The applicant bears the burden of establishing that the benefits they seek are reasonable and necessary. I find R.E. has failed to establish that the benefits in dispute are reasonable and necessary and are therefore not payable.

[14] Problematically, R.E.'s submissions for the three benefits is comprised of a single paragraph re-stating his impairments to argue that the physiotherapy and chiropractic benefits he seeks are reasonable and necessary and were unreasonably denied. He does not offer any analysis as to why the benefits are reasonable and necessary, what the specific benefits entail, how they will address his impairments and which impairments they will address, what the goals of the treatment are, *etc.* In response, Aviva submits that there was no evidence submitted to establish that the provision of the proposed treatments will meet the stated treatment goals and that there are no continuous or corroborative medical clinical notes or records beyond July 28, 2016 to support the need for these treatments. Further, Aviva submits that the treatment plan in the amount of $1,767.16 has never been submitted by R.E. so it cannot be disputed here.

[15] Again, I agree with Aviva. While it is unclear how much of the MIG limit remains, it is well-settled that the burden to prove that treatment is reasonable and necessary and incurred lies with the applicant. As R.E. has adduced no evidence or made any substantive submissions to support why the treatment requested is reasonable and necessary, the Tribunal cannot find him successful in meeting his burden. In addition, the treatment plan in the amount of $1,767.16 is not in evidence and R.E. did not refute Aviva's claim that the OCF-18 was never submitted, so it cannot be found to be reasonable and necessary. As no benefits are overdue, it follows that interest is not payable under s. 51.

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CONCLUSION

[16] For the reasons outlined above, I find that R.E. has not demonstrated, on a balance of probabilities, that he is entitled to an IRB, that his injuries warrant treatment beyond the MIG or that the treatment plans in dispute are reasonable and necessary.

Released: May 11, 2020

Jesse A. Boyce
Adjudicator

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