Citation: Piraisoody v. TD Insurance Meloche Monnex, 2022 ONLAT 20-004986/AABS

File Number: 20-004986/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:

Sivasangari Piraisoody

Applicant

and

TD Insurance Meloche Monnex

Respondent

DECISION

ADJUDICATOR: **Theresa McGee, Vice-Chair**

APPEARANCES:

For the Applicant: Dinesh Shan, Paralegal

For the Respondent: Jennifer Cosentino, Counsel

HEARD: **By way of written submissions**

BACKGROUND

[1] The applicant, Sivasangari Piraisoody, was involved in an automobile accident on March 19, 2016, and sought benefits from the respondent, TD Insurance Meloche Monnex, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*[1] (the "*Schedule*").

[2] The respondent determined that the applicant's injuries fell within the Minor Injury Guideline and denied her medical benefits outside the $3,500.00 funding limit available under the *Schedule*. The applicant then applied to the Licence Appeal Tribunal ("Tribunal") for resolution of the dispute.

ISSUES

[3] The issues to be decided in the hearing are:

a. 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 limit and in the Minor Injury Guideline ?

b. Is the applicant entitled to $1,307.49 for physiotherapy treatment, recommended by Dr. Dharaskar Anjaliand in a treatment plan (OCF-18) dated January 14, 2019?

c. Is the applicant entitled to $2,500.48 for physiotherapy treatment, recommended by Dr. Kashvi Patel in a treatment plan dated March 1, 2020?

d. Is the applicant entitled to $2,200.00 for a psychological assessment, recommended by Dr. Erin Langis in a treatment plan dated September 30, 2019?

e. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[4] The applicant has failed to discharge her onus in establishing entitlement to treatment beyond the $3,500.00 limit for the treatment of minor injuries in the

[1] O. Reg. 34/10.

Schedule. Since no benefits are owing, no interest is payable. There is no basis for an award. The application is dismissed.

ANALYSIS

The Minor Injury Guideline applies

[5] The applicant bears the onus of proving, on a balance of probabilities, that her accident-related injuries are not predominantly "minor" as defined in the *Schedule*. The term "minor injury" is defined in s. 3(1) 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."

[6] If the applicant's injuries are predominantly minor, the Minor Injury Guideline will apply. As s. 18(1) of the *Schedule* provides, funding for treatment under the Minor Injury Guideline is capped at $3,500.00. Where the Minor Injury Guideline applies and the funding limit has been exhausted, it is generally not necessary to examine whether individual treatment and assessment plans are reasonable and necessary as a result of the accident.

[7] This is a clear case of a party failing to meet their evidentiary onus.

[8] The applicant submits that she is entitled to treatment in excess of $3,500.00 on account of her chronic pain and psychological diagnoses, impairments that exceed the definition of a minor injury in the *Schedule*.

[9] In support of her claims, the applicant relies on two items of medical evidence, both from her family physician, Dr. G. Krishna: a March 29, 2016 letter referring the applicant for physiotherapy and massage therapy "for muscle strain involving back" and a February 13, 2020 note indicating that the applicant is able to perform her tasks of daily living and other activities of [*sic*] normal but not to the standards of pre-accident level."

[10] The respondent submits that these records should be excluded because the applicant failed to produce them before the deadline ordered by the Tribunal. While I can appreciate the respondent's position, I will admit the evidence and deal with it as a matter of weight. As I have indicated, the records fall far short of establishing, on a balance of probabilities, that the applicant sustained non-minor injuries in the accident, and the prejudice to the respondent is accordingly minimal.

The evidence does not establish chronic pain

[11] The March 29, 2016 medical letter from Dr. Krishna recommends massage and physiotherapy for the applicant's back strain. It is dated ten days after the accident. It does not support the applicant's submissions as to chronic pain or psychological impairment. The complaint noted in the letter does not correspond to the injuries the applicant advances in her submissions, including serious and ongoing knee and chest pain.

[12] The February 13, 2020 letter is on the letterhead of the applicant's representative firm. In it, Dr. Krishna responds to a question, apparently posed by the applicant's representative, as to whether the applicant is "substantially unable to perform her tasks of daily living and activities of normal life up to the standards of her pre-accident level". Dr. Krishna refers to the applicant having "chronic knee pain for which she takes NSAIDs, for [*sic*] and she continues to do physiotherapy". He also notes that the applicant has more pain with stairs and sometimes experiences flare-ups when standing for prolonged periods.

[13] It is well-established in the case law of this Tribunal that chronicity of pain complaints alone is insufficient to establish a non-minor accident-related impairment. Certainly, a single clinical note that refers to chronic knee pain does not support a finding of the kind of debilitating dysfunction commonly seen in applicants suffering from chronic accident-related pain disorders. While Dr. Krishna notes stairs and prolonged standing as factors that tend to aggravate the applicant's knee pain, there is no evidence to show how often or how severe her dysfunction is. Frankly, the applicant has tendered no evidence to establish the causation or continuity of her knee complaints, documented close to four years after the accident. The only other medical note in evidence refers to back strain.

[14] The applicant submits that "multiple physicians" have diagnosed her with chronic pain. This is not supported by the record. Again, the applicant has tendered two medical documents, both from her family physician. She has led no further evidence of chronic pain.

[15] The respondent has tendered the two OCF-3s (Disability Certificates) it submits it received from the applicant, one in 2016 and the other in 2019, completed by a chiropractor and a physiotherapist respectively. The first OCF-3 lists a contusion (bruising) to the knee. The second identifies "strain and sprain of other and unspecified parts of the knee" as well as "chronic intractable pain in right heel". It also lists post-traumatic stress disorder, a condition which a physiotherapist is not qualified to diagnose. While the OCF-3s are evidence that the applicant reported knee complaints as early as April 2016, there is simply no objective

evidence to establish the nature and severity of her knee pain, any assessment or treatment she may have received from her care providers in the interim, or what functional impairments arise as a result of her knee pain. There are numerous injuries listed in the OCF-3s that the applicant has made no mention of in her submissions. And, as I have noted, some of the diagnoses would be entitled to minimal (if any) weight because they fall outside the practitioner's scope of practice. Post-traumatic stress disorder and chronic pain disorders are not conditions that a physiotherapist is competent to diagnose, and as a result, I am unable to attach weight to the reference to "chronic intractable pain" in the applicant's heel in the 2016 OCF-3.

[16] The respondent's assessor, Dr. S. Dharamshi, a general practitioner, conducted a physical examination of the applicant on April 1, 2019. Though he noted the applicant's complaints of knee tenderness and pain, his physical examination revealed no deformities or abnormalities. Dr. Dharamshi diagnosed right knee contusion/patellofemoral pain, querying meniscal pathology, an injury he determined met the definition of a minor injury.

The evidence does not establish psychological impairment

[17] The applicant also submits that she suffers from an accident-related psychological impairment but has led no medical evidence to support this submission. She submits that she has felt depressed and irritated leading to significant changes in all areas of her life, including work, social life, home duties and beyond. She submits that she was prescribed medication to address these challenges, but again, there is no medical evidence to show that this is the case. She later submits that she declined this prescription.

[18] The applicant relies instead on the findings of the respondent's assessor, Dr. R. Lubbers, who ultimately concluded that the applicant suffered from no diagnosable psychological condition. The applicant submits that this conclusion was "surprising" given that she reported complaints of anxiety to him. In fact, Dr. Lubbers' report notes that the applicant specifically *denied* unusual difficulty coping with anxiety and worry; described her recent dominant mood as "good"; denied suicidal ideation and frequent emotional upset; reported a normal appetite; and described remaining optimistic about her future. I find that Dr. Lubbers' clinical observations support his conclusions. In any event, the applicant has not presented evidence to contradict his assessment.

[19] In conclusion, the applicant has not met her evidentiary onus in respect of the Minor Injury Guideline issue. The evidence does not establish that she suffers from chronic pain or psychological impairments entitling her to medical treatment

above the $3,500.00 limit set out in the *Schedule*. Because the applicant's accident-related injuries are predominantly minor, there is no need to consider whether the individual treatment plans in dispute are reasonable and necessary as a result of the accident. They are not payable. No interest is owing.

There is no basis for an award

[20] The applicant claims an award under Regulation 664 for unreasonably withheld or delayed benefits. The well-established standard for awards under Regulation 664 set out in the Financial Services Commission of Ontario case of *Plowright v. Wellington Insurance Co.* is conduct that is excessive, imprudent, stubborn, inflexible, unyielding, or immoderate. [2]

[21] The applicant submits that the respondent acted in bad faith throughout the claim and appeal process by relying on the evidence of its own assessors while ignoring other information available to it. She submits that this amounts to bad faith. She further submits that the respondent refused to disclose its adjuster's log notes, forcing her to bring a motion to the Tribunal for their production.

[22] The respondent submits that other than the treatment plans in dispute, the applicant submitted no medical evidence in support of her claims. It submits the only evidence it had to rely upon in making its Minor Injury Guideline determination was the evidence of its assessors. It further submits that disclosing adjuster's log notes only after a Tribunal motion order is not a basis for an award.

[23] I agree with the respondent.

[24] The applicant refers me to two cases which she submits are analogous to this one: *Applicant v Portage La Prairie Mutual Insurance Company*, 2019 CanLII 101649 (ON LAT) [*Portage La Prairie*] and *S.M. vs. Unica Insurance Inc.*, 2020 CanLII 12718 (ON LAT) [*S.M.*]. In *Portage La Prairie*, the Tribunal observed that "papering" a termination by obtaining a compliant report from an assessor is not necessarily protection against an award if an insurer closes its mind to other information that is before it.

[25] I see no analogy between the circumstances of this case and *Portage La Prairie*. There is no basis to conclude that the respondent closed its mind to contradictory evidence when relying on the reports of its assessors, as it had no contradictory evidence to consider.

[2] 1993 OIC File No.: A-003985 (FSCO).

[26] *S.M.* is a case that was overturned on reconsideration: see *S.M. v Unica Insurance Inc*., 2020 CanLII 61460 (ON LAT). The applicant appealed the reconsideration decision to the Divisional Court, who dismissed the appeal on June 29, 2021: see *Malitskiy v. Unica Insurance Inc.*, 2021 ONSC 4603 (CanLII) [*Malitskiy*]. To the extent that a decision of this Tribunal has persuasive authority over subsequent decisions, the overturned first instance decision in *S.M.* is minimally persuasive. I do not consider it necessary to seek submissions from the parties on the effect of the Divisional Court's ruling in *Malitskiy*, which was rendered after the parties filed their submissions in this matter, because it is only peripherally relevant to the facts and issues in this case. The applicant relies on *S.M.* for her submission that the respondent, like the insurer in that case, should have been more critical of its assessors' reports when it had other information before it. I am not persuaded that the respondent took an uncritical stance towards the reports of its assessors in the face of contradictory evidence, because at the time of the denials, it possessed no such contradictory evidence.

[27] There is simply no basis in evidence for an award in this case. The applicant has not presented submissions or evidence pointing to the kind of conduct that justifies such a remedy. As such, the request for an award is refused.

[28] To conclude, the applicant has not met her onus. The Minor Injury Guideline applies to the treatment of the applicant's injuries. The benefits in dispute are not payable and no interest is owing. There is no award.

CONCLUSION

[29] The applicant has failed to discharge her onus in establishing treatment outside the Minor Injury Guideline. Her accident-related injuries are predominantly minor. Because the funding available to the applicant has been exhausted, it is not necessary to consider whether the disputed treatments and assessment are reasonable and necessary as a result of the accident. Since no benefits are payable, no interest is owing. There is no basis for an award.

[30] The application is dismissed.

Released: March 3, 2022

Theresa McGee

Theresa McGee
Vice-Chair