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: V.O. vs. Aviva General Insurance, 2020 ONLAT 19-004809/AABS

Released Date: 05/28/2020
File Number: 19-004809/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:

V.O.

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Derek Grant**

APPEARANCES:

For the Applicant: Olga Poznyakova, Paralegal

For the Respondent: Geoffrey Keating, Counsel

HEARD **by way of written submissions**

OVERVIEW

[1] The applicant, V.O., was involved in an automobile accident on August 28, 2016, and sought benefits from the respondent, Aviva, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "Schedule").[1]

[2] Aviva denied V.O.'s claim for Non-Earner Benefits ("NEBs") on the basis that he does not suffer from a complete inability to carry on a normal life, as required by the Schedule. Aviva also denied V.O.'s claim for medical benefits and assessments on the basis that they were not reasonable and necessary. V.O. disagreed and applied to the Tribunal for dispute resolution.

ISSUES

[3] The parties have resolved several of the issues and the remaining issues in dispute are as follows:

a. Is V.O. entitled to receive NEBs in the amount of $185.00 per week for the period of January 5, 2018 to-date and ongoing?

b. Is the medical benefit in the amount of $672.92 for relaxation CDs, recommended by Toronto Healthcare Clinic Inc. in a treatment plan (OCF-18) dated August 31, 2017, denied on September 15, 2017, reasonable and necessary?

c. Are the medical benefits for chiropractic services recommended by Toronto Healthcare Clinic Inc. reasonable and necessary, as follows;

   i. $1,800.00 for an OCF-18 submitted on October 31, 2017, denied on November 10, 2017;

   ii. $1,465.10 for an OCF-18 submitted on November 6, 2017, denied on November 10, 2017; and,

   iii. $1,237.98 for an OCF-18 submitted on December 5, 2017?

d. Is V.O. entitled to an award under Ontario Regulation 664 because Aviva unreasonably withheld or delayed payments?

e. Is V.O. entitled to interest on any overdue payment of benefits?

FINDINGS

[1] O. Reg. 34/10.

[4] I find that V.O. is not entitled to NEBs for the period in dispute because he has not demonstrated that he has a complete inability to carry on a normal life as a result of the accident.

[5] V.O. is entitled to the OCF-18 dated August 31, 2017, including interest.

[6] V.O. is not entitled to an award regarding the OCF-18 dated August 31, 2017.

[7] I find that V.O. is not entitled to the remaining medical benefits in dispute because he has not established that the OCF-18s are reasonable and necessary.

ANALYSIS

Non-Earner Benefits

Physical injuries

[8] In order to receive NEBs, V.O. must prove that he suffers a complete inability to carry on a normal life as a result of the accident.[2] A person suffers a complete inability to carry on a normal life as a result of an accident if the person sustains an impairment that continuously prevents them from engaging in substantially all of the activities in which they ordinarily engaged before the accident and they are not entitled to an income replacement benefit.[3] The leading case of *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391 states that an assessment of the applicant's pre-accident activities and life circumstances over a reasonable period of time prior to the accident is required.[4]

[9] The evidence led concerning V.O.'s pre-accident activities and how his impairments as a result of the accident have led to a complete inability to carry on with them post-accident did not, in my view, meet the requirements of the stringent NEB test. On the evidence, I find that V.O. is not entitled to NEBs for the period in dispute as he has not demonstrated a complete inability to carry on a normal life as a result of the accident.

[10] In support of his position, V.O. relies on the Disability Certificates of Chiropractors Dr. Minnella, dated November 29, 2017 and Dr. Roy, dated October 21, 2019. Dr. Minnella, notes that V.O. suffers from a complete inability to carry on a normal life and is unable to participate in housekeeping activities

[2] The factors that inform the determination of NEB entitlement are outlined in *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391.
[3] O. Reg. 34/10, at ss. 3(7)(a) and s. 12(1).
[4] *Heath* at para. 50.

that he was able to perform pre-accident. Dr. Minnella opined that due to the nature of the injuries and chronicity of complaints, the duration of V.O.'s limitations due to his injuries would go beyond 12 weeks. Dr. Roy also indicated that V.O. suffers a complete inability to carry on a normal life and that V.O. is unable to perform his pre-accident level of housekeeping and home maintenance. Contrary to Dr. Minnella's reporting, Dr. Roy indicated a duration of limitation of 9-12 weeks. V.O. submits that while he is able to participate in some of his pre-accident activities, it is not to the same level and with the same ability as his pre-accident capabilities.

[11] In response, Aviva contends that V.O. does not suffer a complete inability to carry on a normal life. It submits that, "where there is clear evidence of continued participation in daily activities, post-accident, even at a reduced frequency, or with pain, this does not constitute a complete inability".[5] Aviva relies on the findings of its Insurer's Examination ("IE") assessors, Dr. Zabieliauskas, Physiatrist, Dr. Mehdiratta, Neurologist and Ms. Li, Occupational Therapist. Both Dr. Zabieliauskas and Dr. Mehdiratta found that V.O. did not suffer from a complete inability to carry on a normal life from a physical perspective. Aviva submits that V.O. is able to do many of his pre-accident activities, albeit with some difficulties, and the medical evidence does not support that V.O. suffered significant physical impairment as a result of the accident to the extent that he has a complete inability to carry on a normal life.

[12] V.O. offered no comparison of the amount of time he spent on each of his pre-accident activities or on how much value and importance he placed on each. V.O. submits that as a result of the accident, he has now had to rely on the use of his non-dominant left hand. V.O. contends that the reduced function in the use of his dominant hand meets the test of complete inability.

[13] I disagree. V.O. failed to show that the left-hand use was a life-altering result of the accident. I agree that V.O. has had to adjust to using his left hand more than his right, however, the evidence does not satisfy the complete inability test. There is no evidence that V.O. has had to learn to write again, for example. During his assessment with Ms. Li, V.O. was observed to do simple tasks using his left hand for support (i.e. standing from a seated position, putting on a shirt). I do not consider the use of the left hand for simple tasks to indicate a complete inability to carry on a normal life.

[14] As stated earlier, the test for complete inability is a lack of ability to participate in substantially all pre-accident activities. V.O.'s evidence suggests the opposite.

[5] *17-003731 v Aviva Insurance Canada*, 2018 CanLII 81898 (ON LAT) at par. 27

Participating in activities, with pain, is not enough to meet the requirements of the NEB test. V.O.'s reduced level of participation in almost all of the same pre-accident activities, does not satisfy V.O.'s burden to prove that he suffers a complete inability to carry on a normal life.

Psychological impairments

[15] V.O. relies on Dr. Shaul's report dated January 5, 2017 which concluded that V.O. had Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (Travelling in a vehicle). The report indicated that V.O. had difficulty in functioning and an inability to perform pre-accident tasks. The report also opined that V.O.'s psychological condition prevented him from performing his activities of daily living. The report indicates that V.O. has become socially withdrawn, stopped attending family gatherings, visiting and entertaining, and has lost interest in activities that he used to do.

[16] V.O. also relies on Dr. Karmy's chronic pain report dated July 13, 2018 in which Dr. Karmy diagnosed V.O. with chronic pain, sleep disorder and mood disorder, with symptoms of driving anxiety and post-traumatic symptoms. The report indicates that V.O. complained of sleep disturbances and anxiety and mood disturbances. The report also noted that V.O. suffered from cognitive problems such as difficulties focusing and keeping attention as a result of the accident.

[17] Aviva did not conduct its own psychological assessment of V.O. Instead it relied on the reports of its own IE assessors discussed above. Aviva submits that I should give little weight to Dr. Shaul's report as it was conducted prior to the denial of the NEB. Further, that V.O. has provided no evidence that he continues to suffer from a psychological impairment at the time the NEB was denied. Aviva also contends that the records of family physician, Dr. Mark, did not contain any evidence of post-accident psychological complaints, indicating that V.O. did not suffer significant psychological impairment.

[18] The IE reports found that V.O. was still able to maintain a significant level of functioning, for example:

a. V.O. reported to Dr. Z. that he continued to drive post-accident, was independent with toileting and showering, had meals at regular hours, watched TV, completed home exercises, and was going to the gym at least two to three days a week;[6]

[6] Respondent Document Brief – IE assessment report of Dr. Z. dated January 2, 2018 – Tab M at pg. 6.

b. V.O. reported to Ms. Li that he was able to complete self-care activities (at a slower pace), perform light housekeeping, complete light grocery shopping, attend church on Sundays, go to the gym, attend functions and meetings, complete banking independently and read the newspaper;[7] and

c. The report to Dr. Mehdiratta, was similar to that of Ms. Li in terms of V.O.'s self-reporting of his post-accident abilities to complete and participate in his activities of daily living.

[19] I assign more weight to the reports of the IE assessors in my finding that V.O. does not suffer a complete inability to carry on a normal life. From a physical perspective, the IE assessors concluded that V.O. was still able to participate in substantially all of his pre-accident activities. I agree.

[20] From a psychological perspective, I find that V.O.'s evidence does not support that he suffers from a significant psychological impairment that causes him to have a complete inability to carry on a normal life. The family physician records do not contain evidence of psychological complaints. The reports of Dr. Shaul (or Helen Illios on behalf of Dr. Shaul) and Dr. Karmy, are based on V.O.'s self-reporting and are contradicted by the other medical evidence and V.O.'s own evidence.

[21] My finding that V.O. did not suffer a complete inability to carry on a normal life as a result of the accident is further supported by *Heath* from the Court of Appeal and Tribunal jurisprudence. While I am not bound by the decisions of my fellow adjudicators, I do find the case law effective in assisting and considering the requirements for the test for "complete inability".

[22] In *Applicant v. Aviva Insurance Canada*, Adjudicator Ferguson held that to assess whether an insured person meets the threshold for entitlement to NEBs, decision-makers "need an accurate accounting of the insured person's normal activities both before and after the accident. A comparison of pre- and post-accident functionality is essential to establishing entitlement to NEBs".[8]

[23] Tribunal jurisprudence has also established that where accident-related pain is a primary factor that prevents an insured person from engaging in his pre-accident activities, the insured must prove that the pain practically prevents him from engaging in the pre-accident activities.[9]

[7] Respondent Document Brief – IE assessment report of Ms. Li dated January 2, 2018 – Tab N at pg. 3.
[8] *17-008086 v Aviva Insurance Canada*, 2018 CanLII 115661 (ON LAT) at paras 4 to 7.
[9] *Marlene Resendes vs. Aviva Insurance*, 2018 CanLII 97843 (ON LAT), at para 20

[24] Ongoing pain and partial reduction in functional abilities as a result of an accident is not sufficient to meet the test for NEBs.[10] In addition, in order to determine whether an insured suffers from a complete inability, it is helpful to have an account of an insured's pre- and post-accident level of 'ability to carry on a normal life'. What activities (that were essential for a 'normal life') an insured substantially participated in pre-accident is necessary to understand what level of ability the insured has post-accident.

[25] V.O. has not provided a detailed account of which activities were most important to him pre-accident, that he suffers a complete inability to engage in post-accident, as set out in *Galdamez*.[11] In addition, the evidence of his reports to the IE assessors shows that V.O. has actually been able to participate in substantially all his pre-accident activities, albeit at a somewhat reduced rate.

[26] As stated earlier, the test for complete inability is a lack of ability to continuously participate in substantially all pre-accident activities. V.O.'s evidence supports the complete opposite. Participating in activities, with pain, is not enough to meet the requirements of the NEB test. V.O.'s reduced level of participation in almost all of the same pre-accident activities, does not satisfy V.O.'s burden to prove that he suffers a complete inability to carry on a normal life. Neither does V.O.'s dependence on the use of his non-dominant left hand constitute a complete inability.

[27] For the reasons stated above, I am not persuaded that from a physical or psychological level of impairment, V.O. suffers from a complete inability to carry on a normal life as a result of the accident. Consequently, I do not find that V.O. is entitled to NEBs.

Reasonable and Necessary

Is the August 31, 2017 OCF-18 for relaxation CDs reasonable and necessary?

[28] Sections 14 and 15 of the *Schedule* provide that an insurer is liable to pay for reasonable and necessary medical expenses incurred as a result of an accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment or assessment plan is reasonable and necessary.[12]

[29] For the reasons to follow, I find that V.O. is entitled to the OCF-18.

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[10] *17-001125 v Aviva Insurance,* 2018 CanLII 13191 (ON LAT).
[11] *Galdamez v. Allstate Insurance Company of Canada,* 2012 ONCA 508
[12] *Scarlett v. Belair*, 2015 ONSC 3635 (CanLII).

[30] The OCF-18 is for relaxation CDs. In its submissions, Aviva does not dispute the reasonableness and necessity of this OCF-18. While Aviva submits that the OCF-18 is reasonable and necessary, it argues that the OCF-18 is a duplication of services as V.O.'s wife has already received relaxation CDs. Although its position is not without merit, it failed to put forth evidence that CDs requested by V.O.'s are a duplication of the specific CDs V.O.'s wife received. It's on this point that the merits of the duplication of services argument fails. Therefore, I find the OCF-18 to be payable.

Are the OCF-18s for chiropractic treatment reasonable and necessary?

[31] For the reasons that follow, I find that V.O. is not entitled to the chiropractic OCF-18s.

[32] Treatment plans by themselves may not be enough to establish that the proposed treatment is reasonable and necessary. Supportive objective medical evidence that substantiates the reasonableness and effectiveness of the treatment is also of assistance in determining the reasonableness and necessity of the proposed treatment plan. Often this evidence is found in assessment reports and the notes of treating healthcare practitioners. In this case, there are also the self-reports of V.O. on the effectiveness of the treatment. Evidence from the insured about the effectiveness of treatment in relieving pain or improving function is also helpful for an adjudicator to consider in weighing the evidence.

[33] V.O. reported to Dr. Karmy that although he was receiving treatment for his chronic pain, the treatment was "partially helpful" and the benefits from the treatment were "short lasting".[13] I find that V.O.'s self-reporting to Dr. Karmy of the minimal benefit and effectiveness of treatment indicates that more of the same treatment is not reasonable and necessary. Further, Dr. Karmy recommended physiotherapy and other treatment modalities and specifically recommended against chiropractic treatment for the cervical and lumbar spine.

[34] V.O. relies on the Dr. Karmy report for confirmation of the extent of his physical and chronic pain complaints, and I rely on that same report to make my determination regarding the OCF-18s for chiropractic treatment. Despite V.O.'s pain complaints and self-reporting, it does not appear that Dr. Karmy endorses further chiropractic treatment. Dr. Karmy was supportive of other treatment modalities that V.O. had been receiving prior to the report. However, none of those modalities are issues in dispute before me, so I will not comment on their effectiveness.

[13] Applicant Document Brief – Dr. Karmy report – Tab 22 at pg. 6

[35] Aside from the OCF-18s, there are no other recommendations for chiropractic treatment. As stated above, an OCF-18 unsupported by other objective medical evidence may not be enough to establish that the proposed treatment is reasonable and necessary.

[36] While I am cognizant that V.O. still presents with pain complaints, an additional part of considering the reasonableness and necessity of an OCF-18 is whether the associated cost is reasonable for the proposed goal. I find that the "partial relief" and "short lasting" benefits do not persuade me that the OCF-18s are reasonable and necessary. I do not find that the cost of the OCF-18s for chiropractic treatment justifies a 'partial' or 'short term' benefit from pain.

AWARD

[37] Section 10 of *Regulation 664* permits the Tribunal to award a lump sum of up to 50% of the amount to which the insured person (i.e. V.O.) was entitled at the time of the award together with interest on all amounts then owing (including unpaid interest) if it finds that that an insurer (i.e. Aviva) has "unreasonably" withheld or delayed payments.

[38] Aviva did not unreasonably withhold payment of the August 31, 2017 OCF-18. It was not unreasonable for Aviva to raise the argument that there may be a duplication of services. The basis for an award is that the insurer unreasonably withheld payment of a benefit. I find that Aviva did not.

[39] I find that the merits of Aviva's claim of a duplication of services were flawed. However, this is not a ground for an award. Even if the insurer made an error in denying the OCF-18, this is not an automatic ground for an award to be granted.

[40] I do not find that Aviva's actions amount to unreasonably withholding payment of the OCF-18. As such, V.O. is not entitled to an award regarding Aviva's handling of the OCF-18 dated August 31, 2017.

[41] I have already found that V.O. is not entitled to NEBs or the OCF-18s for chiropractic treatment, therefore, Aviva cannot be found to have withheld payment for these benefits.

CONCLUSION

[42] For the reasons stated above, V.O. is not entitled to NEBs or the OCF-18s for chiropractic treatment, therefore no interest or an award is payable.

[43] V.O. is entitled to payment of the OCF-18 dated August 31, 2017, plus applicable interest.

[44] V.O. is not entitled to an award regarding the OCF-18 dated August 31, 2017.

Released: May 28, 2020

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Derek Grant
Adjudicator