

**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**

Date: 2018-07-16

Tribunal File Number: 17-006236/AABS

Case Name: 17-006236 v Royal Sun Alliance Insurance (RSA)

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:

Applicant

Applicant

And

Royal Sun Alliance Insurance (RSA)

Respondent

DECISION

ADJUDICATOR:

Nidhi Punyarthi

APPEARANCES:

Emily K. Foreman, counsel for the applicant

Geoffrey L. Keating, counsel for the respondent

Heard in writing on:

April 30, 2018

OVERVIEW

[1] The applicant was 17 years old when he was involved in an automobile accident on September 18, 2015 (the “MVA”). He sought benefits from the respondent under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “*Schedule*”). The respondent denied the applicant’s request for benefits, and the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”).

ISSUES

[2] The application proceeded to a written hearing before me on the following issues:

- a. Are the applicant’s injuries from the MVA predominantly “minor injuries” as defined in the *Schedule*, and subject to the \$3,500 treatment cap for such injuries pursuant to the *Minor Injury Guideline*?
- b. If the answer to (a) is no, is the applicant entitled to receive:
 - i. \$1,496.76 for occupational therapy services in a treatment and assessment plan dated November 30, 2016 by Pursuit Health Management Inc., denied on December 30, 2016?
 - ii. \$2,273.80 for psychological services in a treatment and assessment plan dated December 11, 2016 by Grace and Harnadek Neuropsychology, denied on January 9, 2017?
 - iii. \$3,901.30 for occupational therapy services in a treatment and assessment plan dated February 2, 2017 by Pursuit Health Management Inc., denied on April 10, 2017?
 - iv. \$2,070.13 for psychological services in a treatment and assessment plan dated December 11, 2016 by Grace and Harnadek Neuropsychology, denied on January 9, 2017?
 - v. \$2,325.89 for optometric services in a treatment and assessment plan dated July 25, 2017 by Neuphysio Rehabilitation, denied on August 18, 2017?
 - vi. a rehabilitation benefit in the amount of \$1,235.00 for social rehabilitation counselling in a treatment and assessment plan dated November 30, 2016 by Pursuit Health Management Inc., denied on December 30, 2016?

These six treatment plans are collectively referred to as “Treatment Plans” in my decision.

- c. Is the applicant entitled to receive income replacement benefits in the amount of \$8,716.89, for the time period of September 25, 2015 to September 15, 2017?
- d. Is the applicant entitled to interest on any outstanding benefit that is found to be payable in accordance with the *Schedule*?

[3] The applicant's submissions raise the following additional issue, which the respondent has also addressed in its submissions:

- e. Is the applicant entitled to an award under Section 10 of Regulation 664 because the respondent unreasonably withheld or delayed payments to the applicant?

RESULT

[4] I find, on a balance of probabilities, that:

- a. The applicant's injuries fall outside of the *Minor Injury Guideline*, and, as a result, the applicant is entitled to more than \$3,500 in treatment.
- b. The Treatment Plans are reasonable and necessary.
- c. The applicant is entitled to income replacement benefits in the amount and for the duration that she has claimed.
- d. The respondent shall pay interest to the applicant in accordance with the *Schedule*.
- e. The applicant is not entitled to an award under Section 10 of Regulation 664.

REASONS

A. *The applicant's injuries fall outside of the Minor Injury Guideline*

[5] I find, on a balance of probabilities, that the applicant's impairments fall outside of the Minor Injury Guideline ("MIG"). My reasons for this finding are as follows:

- a. The applicant's impairments do not come within the definition of a "minor injury";
- b. I have given less weight to the findings of the IE assessor and neurologist, Dr. Desai, as I find that he used irrelevant criteria to form his opinion; and
- c. The applicant has psychological injuries that remove him from the MIG.

- [6] First and foremost, on a balance of probabilities, the applicant suffered from a Mild Traumatic Brain Injury (MTBI). A MTBI is not a minor injury as defined in the *Schedule*.
- [7] The opinion that the applicant likely sustained a MTBI is provided by the neuropsychologist, Dr. Miles.
- [8] Dr. Miles' opinion in this regard is not contradicted by the respondent's assessors. I note, in particular, that:
- a. Dr. Derry, psychologist, did not comment on this opinion as it was outside his area of expertise; and
 - b. Dr. Desai, neurologist, did not assess the applicant for symptoms of a MTBI.
- [9] In her report, Dr. Miles provides the definition of a MTBI as understood by the Mild Traumatic Brain Injury Committee. She also notes that symptoms of a MTBI include reduced concentration, memory difficulties, and executive dysfunction. She states that these symptoms are common in the initial weeks and months following a MTBI, and, in some cases, full recovery may take six months to a year.
- [10] The symptoms of a MTBI, such as difficulties with concentration, and executive dysfunction, as noted by the applicant. In particular:
- a. Dr. Miles, who assessed the applicant approximately 17 months after the MVA, observed that the applicant became more restless over the course of the assessment day, and that he attributed this to increased fatigue and a worsening headache. Dr. Miles observed that the applicant became even more restless when he had to take a long, multiple choice questionnaire at the end of the day.
 - b. Dr. Miles ran neuropsychological tests on the applicant and found that compared to age- and/or education-matched peers, the applicant performed below expectations on a few measures of executive functioning, such as planning and organization, problem-solving and mental flexibility.
 - c. Dr. Miles also performed validity tests before making her conclusions. Her validity testing included a performance validity test and a medical symptom validity test.

- [11] Also, the applicant is found to suffer from headaches. Headaches can impact the applicant's concentration and executive function. I note the following findings from the respondent's assessors:
- a. Dr. Derry notes that the applicant has mood fluctuations where, when his headaches are particularly painful, he feels frustrated and irritable. Dr. Derry notes that these are normal and understandable reactions to his headache pain.
 - b. Dr. Desai notes that the applicant is endorsing a posterior predominant headache.
 - c. Dr. Taylor notes that the applicant experiences daily headaches.
- [12] Therefore, I find, on a balance of probabilities, that the applicant was suffering from symptoms of a MTBI, namely, issues with concentration and executive dysfunction. This is not a minor injury as defined in the *Schedule*.
- [13] I also have before me the opinion of the respondent's assessor and neurologist, Dr. Desai, who has diagnosed the applicant with "cervicogenic headaches," and stated that these headaches are minor injuries.
- [14] I give less weight to Dr. Desai's opinion in this regard because of his methodology.
- [15] Specifically, Dr. Desai assessed the applicant for symptoms of a headache secondary to a traumatic brain injury (TBI). He said that because these symptoms were absent, he was unable to make a finding as to whether the applicant had headaches secondary to a MTBI.¹
- [16] Dr. Desai does not explain why a patient must demonstrate the criteria of a headache secondary to a TBI before he can be diagnosed for a headache secondary to a MTBI. Without that explanation, I have trouble identifying the support for Dr. Desai's methodology and conclusions. I therefore give less weight to Dr. Desai's opinion about the applicant's injuries.
- [17] I am further asked to consider that the applicant continues to suffer from the following impairments, even though 1.5 to 2 years have passed since the MVA:
- a. Persistent headaches;
 - b. Pain;
 - c. Weight gain;

¹ Report of Dr. Jamsheed Desai, p.7 of 9, "Opinion".

- d. Sleep issues;
 - e. Fatigue;
 - f. Difficulties with concentration; and
 - g. Mood issues/irritability/depression.
- [18] In particular, Dr. Miles notes that the applicant's recovery from his cognitive difficulties is dependent on the resolution of other factors that have arisen since the MVA, such as pain, headaches, sleep disturbance, fatigue, and other psychological factors.
- [19] There is evidence of these other impairments that arose from the MVA. For example:

Persistent headaches

- a. Dr. Sequiera, who tendered a physiatry report on behalf of the applicant, noted that he had reviewed a concussion assessment of the applicant dated July 26, 2016, which stated: "throbbing behind eyes.. neck+ back better [with] the exercises.. problems [with] concentration, focus, attention... gets restless when sitting, needs to move." Dr. Sequiera recommends a visit to a physiatrist with brain injury experience, a visit to a neuro-optometrist to assist with vision headaches, and trials of nortriptyline and botulinum toxin injections to manage the headaches and pain.
- b. Ms. Gahagan, OT, recommends that the applicant use aids when scrubbing the bathtub or shovelling snow, as he experiences headache pain when in a forward bending position for a long period of time.

Pain in neck and back

- a. Dr. Sequiera observed that the applicant experienced pain in the extremes of flexion and extension in the lumbar ranges. He also recommended botulinum toxin injections, nortriptyline, and analgesic creams to help with the pain.
- b. Ms. Gahagan, OT, noted that the applicant faces limitations when carrying grocery bags, exercising, and shoveling snow, due to his pain.
- c. Ms. Galbraith, social worker, noted that the applicant is less social due to his pain, which ultimately leads to regret and negative feelings.

Weight Gain

- a. Dr. Sequiera and Dr. Desai noted that the applicant had gained weight since the MVA.
- b. Dr. Miles noted that the applicant went less frequently to the gym, and experienced poor motivation following the MVA.
- c. Ms. Gahagan, OT, noted that the applicant complained of exercise as aggravating his headaches and back pain.

Sleep Issues and Fatigue

- a. The applicant reported to Dr. Miles and Dr. Sequiera that he had difficulty getting proper sleep due to his headaches and pain. This also led to fatigue.

Difficulties with concentration

- a. Dr. Miles observed these difficulties when she ran neurological tests on the applicant.
- b. Dr. Miles recommended that the applicant seek accommodations when taking exams at school.

Issues with mood/irritability/depression

- a. Dr. Miles and Ms. Galbraith indicated that the applicant's depression may be linked to less social involvement and less physical activity compared to his life before the MVA.
- b. Dr. Derry indicated that the applicant's irritability and mood issues could be related to his headaches.

[20] Overall, then, the evidence before me indicates that the applicant has been impaired by the MVA in a number of areas, and that these impairments persist even 1.5 to 2 years after the MVA. According to Dr. Miles, these impairments interfere with the applicant's cognitive abilities. I am satisfied, then, that collectively, these impairments demonstrate the applicant's psychological injuries arising from the MVA. They are not treatable under the quick recovery track and the limited treatment amount of the MIG. These psychological injuries remove the applicant from the MIG.

[21] For these reasons, the applicant's injuries fall outside of the MIG. He is entitled to more than \$3,500 in treatment, provided that such treatment is reasonable and necessary.

B. The Treatment Plans are reasonable and necessary

- [22] I find that the Treatment Plans are reasonable and necessary, given the applicant's impairments arising from the MVA. I will discuss each claimed Treatment Plan in turn.

Occupational therapy assessment by K. Gahagan, OT, for \$1,496.76

- [23] The objective of this treatment plan dated November 30, 2016 is to assist the applicant with the limitations on his activities caused by his pain.
- [24] The applicant has filed a report by Ms. Gahagan, which indicates that the applicant suffers from pain, and that his experience of pain limits his activities at home.
- [25] I am therefore satisfied, on a balance of probabilities, that this treatment plan is reasonable and necessary.

Claim for a psychological assessment by Dr. Miles, for \$2,273.80

- [26] In this treatment plan dated December 11, 2016, Dr. Miles recommended a psychological assessment of the applicant in relation to his mental health and addictions.
- [27] According to Dr. Miles' report, following the MVA, the applicant is suffering from a number of impairments, which negatively impact his cognitive abilities. I also have evidence before me that the applicant suffers from problems with his mood and a mild depression following the MVA, manifested by reduced attendance at the gym, and reduced socializing with friends.
- [28] I am therefore satisfied, on a balance of probabilities, that this treatment plan is reasonable and necessary.

Claim for occupational therapy services in the amount of \$3,901.30

- [29] This treatment plan is dated February 2, 2017, and recommends specified occupational therapy sessions, a snow blower, a lawn mower, aids and other devices.
- [30] Dr. Sequiera's examination indicates that the applicant experiences pain in his lumbar region. As well, based on the in-home occupational therapy assessment of Ms. Gahagan, the applicant experiences pain and limitation when he performs certain activities at home, such as grocery shopping, lawn mowing, snow shoveling, and bathtub cleaning.

- [31] In particular, the applicant is unable to carry heavy items, lift, pull or drag weight-bearing items, or bend for prolonged periods of time without experiencing pain. Accordingly, the applicant would benefit from aids for lawn mowing, snow shovelling, and bathtub cleaning.
- [32] I am therefore satisfied, on a balance of probabilities, that this treatment plan, including the listed aids and devices, is reasonable and necessary.

Claim for psychological services in the amount of \$2,070.13

- [33] The objective of this treatment plan dated December 11, 2016 is for the applicant to undergo a neurocognitive assessment.
- [34] I have before me a neurocognitive assessment of the applicant prepared by Dr. Miles. I am satisfied that this assessment provided an opinion of the likely causes of the applicant's cognitive difficulties.
- [35] I am therefore satisfied, on a balance of probabilities, that this treatment plan is reasonable and necessary.

Claim for physiotherapy and optometry services in the amount of \$2,325.89

- [36] This treatment plan was prepared by physiotherapist Dr. Brenda Enn, and proposed physiotherapy treatment, exercise equipment, and a neuro-optometry assessment.
- [37] The applicant's impairments following the MVA include headaches, neck and back pain. Also, Dr. Sequiera recommends a neuro-optometry assessment.
- [38] Based on this evidence, I am satisfied, on a balance of probabilities, that the services recommended in this treatment plan are reasonable and necessary.

Claim for social rehabilitation counselling in the amount of \$1,235.00

- [39] In this treatment plan prepared by Ms. Gahagan, OT, dated November 30, 2016, it is indicated that the applicant is to undergo a social work assessment for counselling supports to facilitate his recovery.
- [40] The applicant's impairments following the MVA, such as his depressed mood and low motivation, are such that he would benefit from a social work assessment and an identification of counselling needs and supports available to him.
- [41] I am therefore satisfied, on a balance of probabilities, that this treatment plan is reasonable and necessary.

C. The applicant is entitled to income replacement benefits, but not in the amount claimed

- [42] The test for income replacement benefits is set out in Section 5(1) of the *Schedule*.
- [43] The applicant had started working as a produce clerk at a [grocery store], as of July 2, 2015, and was working at the time of the MVA. The essential tasks of his employment included: lifting, re-piling, and working product; re-stocking the floor with produce; unloading skids with a pump jack; and pulling skids containing boxes of produce within the store.
- [44] The respondent has asked me to consider that the applicant, by his own report, left his employment in order to focus on his school and to join his family on a planned vacation.
- [45] The applicant, on the other hand, has asked me to consider that he attempted to work at [the grocery store] after the MVA, and had to call in sick, leave early, and eventually quit due to his experience of increased pain levels.
- [46] The physical and occupational therapy assessments of the applicant indicate that he suffered from neck and back pain after the MVA, and that exercise made his pain worse. The assessments of Dr. Sequiera and Ms. Gahagan also indicated that the applicant experienced pain and limitations when:
- a. Lifting heavy objects;
 - b. Engaging in prolonged bending;
 - c. Engaging in prolonged dragging and lifting of equipment such as a lawn mower and a snow shovel.
- [47] I also note that the reports filed by the respondent do not specifically address occupational therapy or the ability of the applicant to perform the above-noted tasks.
- [48] The evidence clearly supports the applicant's claims of restrictive limitations and pain experienced when performing certain tasks at home also applies to his performance of the essential tasks of a produce clerk at [the grocery store]. In particular, I find that because of the MVA, the applicant was substantially unable to perform the following essential tasks:
- a. Unloading skids of produce with a pump jack;
 - b. Dragging loaded and unloaded skids in the physical space of a large grocery store; and

c. Lifting, and stocking boxes of produce.

- [49] In addition, I find that the applicant's impairments arising from the MVA, such as headaches, sleep problems, and problems with concentration, made it all the more difficult for him to balance school and work at the same time.
- [50] I therefore find, on a balance of probabilities, that the applicant was substantially unable to perform the essential tasks of his employment as a part-time produce clerk at [the grocery store] as a result of and within 104 weeks of the MVA. Accordingly, the applicant is entitled to payment of income replacement benefits.
- [51] With respect to the amount of the income replacement benefits claimed, the applicant has submitted the report of Brandon De Vries of MDD Forensic Accountants dated November 28, 2017. This report calculates the income replacement benefits payable to the applicant between September 26, 2015 and September 15, 2017.
- [52] The respondent submits that if income replacement benefits are payable to the applicant, such benefits should start from the date the applicant elected to receive these benefits, which was November 11, 2015. The respondent relies on the Tribunal's decision in *17-002496 v. Aviva Insurance Company of Canada*. I have not been provided with any reply submissions from the applicant in this regard.
- [53] The decision of the Tribunal in *17-002496* is distinguishable on the facts. The applicant in that case had waited about 5 years to make an election. The election was made after the appeal was filed with the Tribunal.
- [54] As well, Adjudicator Flude has recently clarified and distinguished *17-002496*. In *17-005302 v. Aviva Insurance Company of Canada*, Adjudicator Flude found that the applicant had duly made her election for income replacement benefits. It did not make sense to deprive the applicant from her entitlement to income replacement benefits up until the date of the election, as a reasonable time period had passed in gathering and completing documents. The *Schedule* provides for a one-week deductible for income replacement benefits, and it is virtually impossible for most applicants to receive a request for and complete an election within the first week of the MVA. The applicant should not be penalized for the reasonable time incurred in reviewing, gathering and completing information in the regular course of adjusting a file.
- [55] In the case before me, the respondent received the applicant's (OCF-1) on October 6, 2015, and disability certificate (OCF-3) on October 26, 2015. The respondent asked the applicant to make an election on November 5, 2015. The applicant responded with his election for income replacement on November 11, 2015.

[56] The applicant responded with his election in 6 days. This is a reasonable timeframe to respond to a request for an election, and should not, by itself, be used as a reason to disentitle the applicant from his claimed benefit.

[57] Accordingly, the respondent shall pay the applicant \$8,716.89 in income replacement benefits, as calculated by Mr. De Vries, for the period from September 26, 2015 to September 15, 2017.

D. Interest is payable

[58] The respondent shall pay the applicant interest on the overdue Treatment Plans and income replacement benefits in accordance with the *Schedule*.

E. The applicant is not entitled to a special award

[59] The applicant submits that the respondent failed to acknowledge or act on documents in its possession, and mismanaged the applicant's claim for income replacement benefits. The applicant relies on correspondences between the parties.

[60] I see from the correspondence that the respondent put the applicant to an election on November 5, 2015. The applicant elected to receive income replacement benefits on November 11, 2015. On November 16, 2015, the respondent requested certain documents from the applicant in order to assess the income replacement benefits claim.

[61] I see a handwritten notation next to "pay stubs" on the respondent's request letter of November 16, 2015. The notation states "sent 11/23/15 up to Nov. 11/15". There is no indication of who made this notation or when the item marked was sent. I also do not have any other documents, such as a cover letter or a confirmation of delivery in this regard.

[62] In the evidence before me, the applicant's next follow-up communication to the respondent is over a year later, on November 23, 2016. The respondent responds one day later, on November 24, 2016, to confirm that a new insurance company has taken over the matter, and that the file is closed.

[63] The next correspondence from the applicant that I am pointed to is dated September 11, 2017, which is almost 10 months later. This letter indicates that a forensic accountant will be retained by the applicant.

[64] I have not been provided with any explanation for these lengthy gaps in communication on the part of the applicant.

- [65] The applicant also states that the respondent failed to acknowledge the OCF forms that were acknowledged by its predecessor. I am satisfied that this, in and of itself, may be attributed to human error. Importantly, the OCF was not the only document outstanding from the applicant to the respondent. The applicant was required to deliver many other documents to the respondent, such as income tax returns and employment file information. From what I see, these other documents were not delivered to the respondent until November 2, 2017.
- [66] Given the delays evident in the communications and delivery of documents from the applicant, I find that there is no basis for an award under Section 10 of Regulation 664 against the respondent.

CONCLUSION

- [67] For the reasons provided above, I find that:
- a. The applicant's injuries fall outside of the *Minor Injury Guideline*, and, as a result, the applicant is entitled to more than \$3,500 in treatment.
 - b. The Treatment Plans are reasonable and necessary, and the respondent shall pay for them.
 - c. The applicant is entitled to income replacement benefits, in the amount of \$8,716.89, for the period from September 26, 2015 to September 15, 2017.
 - d. The respondent shall pay interest to the applicant in accordance with the *Schedule*.
 - e. The applicant is not entitled to an award under Section 10 of Regulation 664.

Released: July 16, 2018

Nidhi Punyarthi
Adjudicator