

**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: **SSR vs. Unifund Assurance Company, 2019 ONLAT 18-004772/AABS**

Date: June 25, 2019

File Number: 18-004772/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:

SSR

Appellant(s)

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: Christopher A. Ferguson

APPEARANCES:

For the Applicant: Sahereh Baghbani, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD In Writing on: February 4, 2019

REASONS FOR DECISION

OVERVIEW

- [1] The applicant, SSR, was involved in an automobile accident on July 5, 2016. While swerving to avoid a truck that had entered his lane on the highway, SSR rear-ended a stopped vehicle on an exit ramp.
- [2] SSR sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ ("the Schedule"). He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("the Tribunal") when the respondent, Unifund, denied his claim.
- [3] Unifund denied SSR's claims because it determined that his injuries fit the definition of "minor injury" prescribed by s. 3(1) of the Schedule and, therefore, fall within the Minor Injury Guideline² ("the MIG"). SSR's position is the opposite.
- [4] If Unifund's determination is correct, then SSR is subject to a \$3,500.00 limit on medical and rehabilitation benefits prescribed by s.18(1) of the Schedule and, in turn, a determination of whether claimed benefits are reasonable and necessary will be unnecessary, as the \$3,500.00 maximum benefit for minor injuries has been exhausted.
- [5] If SSR's position is correct, then I must address the issue of whether each of the medical benefits disputed is reasonable and necessary.
- [6] Unifund has also raised a compliance issue which could prevent SSR's appeal from proceeding. Unifund asserts that SSR failed to attend an insurer's examination as required by s. 44 of the Schedule. As a consequence, Unifund argues, SSR is barred from appealing its determination that his injuries are governed by the MIG. This would effectively extinguish SSR's claims.

PRELIMINARY ISSUE

- [7] Is SSR prevented from proceeding with this appeal because he failed to attend an insurer's examination as required by s. 44 of the Schedule?

¹ O.Reg. 34/10.

² Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act*.

SUBSTANTIVE ISSUES

- [8] Did SSR sustain predominantly minor injuries as defined by the Schedule? Is his entitlement to benefits limited by the MIG?
- [9] SSR's injuries are not within the MIG, then:
1. Is SSR entitled to receive a medical benefit in the amount of \$1,420.20 for chiropractic treatment recommended by Healthmax Physio in a treatment plan ("OCF-18") submitted on May 1, 2017 and denied on May 10, 2017?
 2. Is SSR entitled to the cost of examination in the amount of \$2,289.85 for chronic pain assessment recommended by Healthmax Physio in an OCF-18 submitted on August 15, 2017 and denied on August 28, 2017?
 3. Is SSR entitled to payment of other expenses in the amount of \$200.00 related to the completion of Disability Certificate ("OCF-3") submitted on August 9, 2016?³
 4. Is SSR entitled to payment of other expenses in the amount of \$200.00 related to the clinical notes and records (CNRs) from Healthmax Physio submitted on July 19, 2017?
 5. Is the applicant entitled to interest on the overdue payment of benefits?
- [10] Is SSR entitled to receive a non-earner benefit (NEB) of \$185.00 per week from January 5, 2017 to date and ongoing?⁴

RESULT

- [11] SSR's appeal is not barred. I have determined the issues in dispute.
- [12] Unifund did not respond to issue 4 in para. 8 above. Accordingly, I find that SSR is entitled to \$200.00 in expenses for the CNRs from Healthmax Physio, with interest at the prescribed rate.
- [13] SSR is removed from the MIG because he has a chronic pain condition as a direct result of the accident.

³ Unifund conceded in submissions that SSR is entitled to \$200.00 for OCF-3 costs. Issue settled.

⁴ Unifund's submission indicates that it agrees that SSR was entitled to receive an NEB of \$185.00 per week from January 5, 2017 to January 24, 2017. I will adjust the contested period in the NEB dispute accordingly.

- [14] SSR is entitled to be paid the medical benefit set out in the OCF-18 submitted on May 1, 2016, with interest at the prescribed rate.
- [15] SSR is not entitled to be paid the cost of examination set out in the OCF-18 submitted on August 15, 2016.
- [16] SSR is entitled to NEBs from September 27, 2016 to date and ongoing, with interest at the prescribed rate.

ANALYSIS

Is SSR barred from proceeding with this appeal because he failed to attend an IE?

- [17] As noted in para. 6 above, Unifund has asked the Tribunal to bar SSR's appeal because he failed to attend an IE. Unifund raised this issue for the first time in its responding submissions in this proceeding. SSR did not raise any procedural objections to this, and, in fact, addressed this issue in his reply. Accordingly, I will deal with it on its merits.
- [18] Section 44(1) of the Schedule governs IEs and, among other things, prescribes as follows:
- i Section 44(1) permits an insurer to require an insured person to be examined by one or more regulated health professionals to determine whether the insured continues to be entitled to a particular benefit or benefits.
 - ii Section 44(9)iii requires the insured person to cooperate with the examination and to submit to all reasonable examinations requested by the examiner.
- [18] Section 55(1)2 of the *Schedule* provides that an insured person shall not apply to the Tribunal if the insurer has notified him that it requires an examination under s. 44, but the insured person has not complied with that section.
- [19] Section 55(2) allows the Tribunal to permit an appeal to proceed despite such non-compliance.
- [20] I reject Unifund's attempt to bar SSR's appeal for the following reasons:
- i Unifund's submission provides me with no details of the IE issue – it doesn't even tell me when the IE was requested or scheduled, let alone show me the notice that it was required to send. Unifund simply states that I must bar SSR's appeal under s. 55 because that section is "mandatory." This argument is insufficient for me to impose such a drastic remedy as barring an appeal.

- ii From SSR's submissions, I learned that Unifund requested the IE on December 19, 2018, which is more than a year after its denial of the disputed claims and, more significantly, over two months after SSR filed this appeal. Unifund scheduled the IE for January 14, 2019, days after SSR filed his initial submission in this matter and about two weeks before the date of this hearing. I find it would be unreasonable and unfair to insist that SSR's refusal to attend this IE, on the eve of his appeal hearing, constituted the kind of non-compliance that should be punished.
- iii Section 44(1) prescribes the purpose of IEs: they may only be required to determine an insured person's entitlement to benefits. The long delay and then the timing of Unifund's IE request and date undermines my willingness to believe that Unifund scheduled this IE as part of a good-faith effort to continue adjusting SSR's file. It is not clear to me that SSR was actually obliged to comply with Unifund's request under these circumstances.
- iv I agree with SSR that the wording of s. 55(1)2 does not support barring an appeal that has been lawfully made and has actually begun to proceed. SSR was entitled to appeal when he filed his application, and I see no authority for me to terminate a properly commenced and ongoing proceeding under these circumstances.

[21] I will proceed to determine the MIG issue.

The Minor Injury Guideline

- [22] Section 3(1) of the Schedule defines a "minor injury" 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 and includes any clinically associated sequelae to such an injury." The MIG defines in detail what these terms for injuries mean.
- [23] The onus is on the applicant to show that his injuries fall outside of the MIG.
- [24] SSR submits that he should be removed from the MIG because:
- i He has a pre-existing condition.
 - ii He sustained psychological injuries as a result of the accident.
 - iii He suffers chronic pain.
- [25] It is uncontested that any of the medical conditions asserted by SSR and listed in the paragraph above would, if proven, remove him from the MIG.

[26] If I find that one of the removal criteria claimed by SSR is proven, it will not be necessary for me to address the others.

Does SSR suffer chronic pain that would remove him from the MIG?

[27] Chronic pain, if established, removes a claimant from the MIG, because the prescribed definition of “minor injury” does not include chronic pain conditions.

[28] SSR submits that, in a Chronic Pain Assessment Report by Dr. Roger Lam, MD, a consultant, dated October 30, 2017, SSR was diagnosed with Chronic Post-Traumatic Pain Syndrome and other pain-related conditions "as a direct result of the motor vehicle accident dated July 8, 2016".

[29] I give Dr. Lam’s report decisive weight in determining the chronic pain question because:

- i His report is uncontroverted by any medical evidence from Unifund.
- ii Dr. Lam’s diagnosis is clear and carries probative weight. Dr. Lam details specific criteria for diagnosing chronic pain endorsed by the Ontario College of Physicians and Surgeons, and he applies them to SSR’s condition. Those criteria are uncontested by Unifund.
- iii Dr. Lam addresses how and why SSR’s condition would prevent maximal medical recovery (MMR) within the funding cap imposed by the MIG, with detailed reference to specific treatments that he recommends for SSR.
- iv Dr. Lam’s review of medical documentation from treatment providers was, in my view, adequate. Unifund’s criticism that Dr. Lam failed to review CNRs from SSR’s family physician does not persuade me to reject Dr. Lam’s conclusions.
- v Dr. Lam opines that the accident is a direct cause of SSR’s chronic pain condition.

[30] SSR’s accident-related injuries include a chronic pain condition, he is exempt from the MIG, and I will determine whether or not the OCF-18s in dispute are reasonable and necessary.

Medical Benefits

[31] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical expenses that are reasonable and necessary as a result of the

accident. The applicant bears the onus of proving on a balance of probabilities that any proposed treatment or assessment plan is reasonable and necessary.⁵

OCF-18 submitted May 1, 2016

- [32] I find the OCF-1 dated May 1, 2016 to be reasonable and necessary because it is highly consistent with elements of a multi-disciplinary approach recommendation made in Dr. Lam's report. The treatment plan includes physiotherapy, chiropractic and active exercise components recommended by Dr. Lam.
- [33] Unifund's criticism that the OCF-18 does not include all of the modalities recommended by Dr. Lam, such as low-level laser therapy or psychological treatment, and that it isn't expressly part of a multidisciplinary chronic pain program do not persuade me that the plan is unreasonable or unnecessary. I am not of the view that it would be fair to SSR to demand that he delay treatment further pending the development of a new, improved plan, especially in view of Dr. Lam's opinion that treatment should begin quickly to avoid development of permanent chronic pain.

OCF-18 submitted August 15, 2016

- [34] I find the OCF-1 dated August 15, 2016 not to be reasonable and necessary because it is duplicative of Dr. Lam's chronic pain assessment, which was completed in October 2017. SSR does not address the obvious duplication issue, and it appears to me that Dr. Lam has provided the diagnoses and detailed recommendations that SSR and his service providers need to develop treatment approaches to his chronic pain. I note that Dr. Lam did not include a specific recommendation on follow-up assessments.

NEBs

- [35] Section 12 of the Schedule requires an insurer to pay a non-earner benefit (NEB) to an insured person who does not qualify for an income replacement benefit and who suffers a complete inability to carry on a normal life as the result of an impairment sustained in an accident. The compensable impairment must arise within 104 weeks after the accident.
- [36] Section (3)(7)(a) explains that "a person suffers a complete inability to carry on a normal life...if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident."
- [37] Under s. 12(3), the insurer is not required to pay an NEB for the first four weeks after the onset of the complete inability to carry on a normal life.

⁵ *Scarlett v. Belair*, 2015 ONSC 3635

- [38] I find that SSR is entitled to NEBs because Dr. Lam's report supports that conclusion, with references to specific activities in which SSR could, at the time, no longer engage – most notably adult education courses, but also social and recreational pursuits and housekeeping. Unifund does not deny that this level of impairment, if proven, would entitle SSR to NEBs.
- [39] That said, Unifund contention that SSR's accounts of pre- vs. post-accident activities and limitations require corroborating evidence to be accepted does not persuade me. In my view, the consistency of Dr. Lam's clinical test and other observations with SSR's account and his belief in SSR's self-reporting are persuasive evidence that SSR is credible in his self-reporting on this issue, and help me to conclude that SSR has met the test for NEBs.
- [40] SSR is entitled to NEBs from January 25, 2017 to date and ongoing.
- [41] SSR argues in submissions that he is entitled to NEBs from September 27, 2016 to January 25, 2017 in effect because Unifund did not respond to his OCF-1 and OCF-3 dated September 26, 2017. SSR raises this issue for the first time in its Initial submission in this proceeding. Unifund did not raise any procedural objections to this and, in fact, addressed this issue in its response. Accordingly, I will deal with it on its merits.
- [42] Under s. 36(6) of the Schedule, Unifund was required to pay the NEBs from the date it received the application and completed OCF-3 – September 27, 2016 -- until the day it gave the required notice of its decision to deny the claim – January 25, 2017. This is the prescribed consequence of Unifund's failure to provide SSR the required notice within ten days of receiving his OCFs, contrary to s. 36(4) of the Schedule.
- [43] Unifund concedes that SSR is entitled to NEBs for the time up to January 25, 2017, which is the date on which it responded to his NEB claim. Unifund appears to have miscalculated the start date of this entitlement period based on a repealed section of the Schedule that prescribed 26 week waiting period for NEBs, which explains its assertion of January 5, 2017 as the start date. In fact, on July 5, 2016,⁶ the prescribed waiting period was four weeks. I find that SSR's eligibility for NEBs began on August 2, 2016, and that his entitlement began on September 27, 2016 when he submitted his claim.

CONCLUSION

- [44] SSR's injuries are not minor and his entitlement to medical benefits is not governed by the MIG.

⁶ The date of the accident.

[45] Medical benefits:

- i The CNR expenses claimed in issue 4, para. 8 above are uncontested and therefore payable with interest at the prescribed rate.
- ii The OCF-18 submitted May 1, 2016 is reasonable and necessary and is payable with interest at the prescribed rate.
- iii The OCF-18 submitted August 15, 2016 is not reasonable and necessary.

[46] SSR is entitled to NEBs from September 27, 2016 to date and ongoing, in the amount of \$185.00 per week. The NEBs are payable with interest at the prescribed rate.

Released: June 25, 2019

**Christopher A. Ferguson
Adjudicator**