Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Tomassi v. Unifund Assurance Company, 2023 ONLAT 21-000267/AABS

Licence Appeal Tribunal File Number: 21-000267/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:

Adreano Tomassi

Applicant

and

Unifund Assurance Company

Respondent

DECISION AND ORDER

VICE-CHAIR: **Monica Ciriello**

APPEARANCES:

For the Applicant: Amelia Theiss, Counsel

For the Respondent: Bhavpreet Saini, Counsel

HEARD: **By Way of Written Submissions**

BACKGROUND

[1] The applicant was involved in an automobile accident on January 2, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (*the *"Schedule")*.[1] The applicant was denied certain benefits by the Unifund Assurance Company, (the "respondent"), and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal").

PRELIMINARY ISSUE

[2] The respondent submits that the applicant should be precluded from relying on the clinical notes and records ("CNRs") of the MCI The Doctor's Office, as the respondent was never provided these records despite numerous requests. The applicant failed to comply with the Tribunal's Case Conference Report and Order which required the applicant to produce "CNRs for all treating practitioners one-year pre-accident to date and ongoing."[2]

[3] In response, the applicant submits that the CNRs were provided to the respondent as part of the applicant's submissions on February 17, 2022 and submits that there was no prejudice to the respondent.

[4] Though I do appreciate the respondent's submissions, I find that the respondent failed to provide any submissions or evidence of prejudice as a result of the preliminary issue of the CNRs.

[5] However, I will consider the non-compliance with a previous Order when assessing the weight of the evidence.

[6] I would be remiss if I did not caution the parties that any time there is a non-compliance with a previous Order, parties risk exclusion of submissions or evidence of both.

ISSUES

[7] The following issues are to be decided:

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[1] O. Reg. 34/10 as amended.
[2] Case Conference Report and Order dated June 16, 2021.

a. Are the applicant's injuries predominately minor as defined by the *Schedule* and subject to the treatment limit under the Minor Injury Guideline ("MIG")?[3]

b. Is the applicant entitled to income replacement benefit of $400.00 per week from January 9, 2019, to April 22, 2019?

c. Is the applicant entitled to $3,170.68 for physiotherapy, proposed by 101 Physio in a treatment plan ("OCF-18") denied on May 24, 2019?

d. Is the applicant entitled to $2,460.00 for a functional ultrasound, proposed by 101 Assessments in an OCF-18 denied on March 18, 2019?

e. Is the applicant entitled to $2,460.00 for a psychological assessment, proposed by 101 Assessments in an OCF-18 denied on March 4, 2019?

f. Is the applicant entitled to $2,460.00 for a chronic pain assessment, proposed by 101 Assessments in an OCF-18 denied on August 27, 2019?

g. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[8] I find that:

a. The applicant's injuries are predominately minor and therefore subject to the treatment within the $3,500.00 limit of the MIG;

b. The applicant was paid IRB by the respondent;

c. The treatment plans in dispute are not payable; and

d. The applicant is not entitled to an award or interest.

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

ANALYSIS

[9] On January 2, 2019, the applicant was involved in a motor vehicle accident. The applicant did not lose consciousness and did not go to the hospital.[4]

APPLICABILITY OF THE MINOR INJURY GUIDELINE ("MIG")

[10] The MIG establishes a framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in s. 3(1) of the *Schedule* as, "one or more of a strain, sprain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury."

[11] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the applicant sustains an impairment that is predominantly a minor injury in accordance with the MIG.

[12] An applicant may receive payment for treatment beyond the $3,500.00 limit if they can demonstrate that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG or, if they provide evidence of an injury that is not included in the minor injury definition in s.3(1). The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG.

[13] It is the applicant's burden to establish entitlement to coverage beyond the $3,500.00 cap on a balance of probabilities.[5]

Did the applicant suffer physical injuries that warrant the removal from the MIG?

[14] I find that the evidence establishes that the applicant's physical injuries fall within the minor injury definition for the following reasons.

[15] The applicant submits that as a result of the accident, he developed spondylolysis to his lumbar spine, which is not predominately minor and therefore not treatable within the *MIG*. In the alternative and based on the same arguments the applicant submits that his defect is a pre-existing condition.

[16] The applicant relies on the clinical notes and records ("CNRs") of Dr. Matthew Kereliuk, family physician, dated April 9, 2019, who notes that the applicant has ongoing discomfort in his left neck, left shoulder and lower back. Dr. Kereliuk's

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[4] Psychology Assessment Report, Dr. Marc Mandel, dated July 15, 2019.
[5] *Scarlett v. Belair Insurance,* 2015 ONSC 3635, para. 24 (Div. Ct.).

assessment was a muscle strain, specifically noting "likely trapezius strain, rotator cuff strain left, lumbar paraspinals strain" and ordered an x-ray of the cervical and lumbar spine.[6] The x-ray was reviewed by Dr. Edmond Leung, Physician Diagnostic Radiologist, who noted no fractures.[7]

[17] Despite the diagnosis of Dr. Leung, the applicant relies on the x-ray report analysis of Dr. William Hsu, chiropractor, dated June 29, 2019. Dr. Hsu opined a "finding of unilateral pars defect at left L3. Due to the absence of contralateral sclerotic pedicle, there is a high probability that this is a bilateral pars defect."[8]

[18] Furthermore, the applicant notes that Dr. Hsu's findings of unilateral pars defect were repeated by the section 44 Insurers Examination ("IE") Physiatry Assessment of Dr. Yuri Marchuk, physiatrist, dated November 5, 2021. The respondent takes issue with this submission and provides that it is an attempt to mislead the Tribunal, as the x-ray imaging were never provided to the respondent and thereby Dr. Marchuk never had the opportunity to review them in the preparation of his assessment. Dr. Marchuk was provided the report by Dr. Hsu, which did not include the x-ray imaging and it was referenced in the IE assessment.

[19] The applicant provides that spondylolysis or a pars defect is a stress fracture of the bones of the lower spine and is not a minor injury and is not treatable within the MIG. The applicant cites *16-000087 v. Unifund Assurance Company*[9] where the adjudicator found that the applicant's pre-existing medical condition of spondylolisthesis would prevent the applicant from achieving maximal recovery within the MIG.

[20] The respondent submits that the applicant is not suffering from spondylolysis or a pars defect. The respondent relies on the applicant's x-ray results which Dr. Leung concluded as having no fractures in his left shoulder, cervical spine or lumbar spine. The respondent submits that the findings of Dr. Leung should be preferred by the Tribunal over Dr. Hsu, as he was the only physician that reviewed the x-ray imaging.

[21] The respondent relies on the IE assessment of Dr. Marchuk and even with a reference to pars defect, Dr. Marchuk opined that the applicant remained in the MIG.

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[6] CNRs, Dr. Kereliuk, dated April 9, 2019.
[7] Windflower Diagnostic Imaging Inc., Dr. Leung, dated April 9, 2019.
[8] Chiropractic Radiological Consultation Service Report, Dr. Hsu, dated June 29, 2019.
[9] 2016 CanLII 104570 (ON LAT)

[22] In response to *16-000087 v. Unifund Assurance Company*, the respondent states the case does not apply, as the applicant is not suffering from severe degenerative disc disease. Furthermore, spondylolisthesis and spondylolysis are two different injuries and the x-ray imaging of April 9, 2019 specifically states lumbar spine: no fracture, no spondylolisthesis.[10]

[23] When reviewing the evidence before me, I note that the CNRs of Dr. Kereliuk, provide a finding of soft tissue sprains and strains. Furthermore, in reviewing the results of the applicant's diagnostic imaging, there are no abnormalities, and no fractures as found by Dr. Leung. As the only physician who had an opportunity to review the applicant's diagnostic imaging, I am persuaded by the opinion of Dr. Leung. As referenced in the preliminary issue of this decision, when assessing the weight of the evidence before me that was not provided to the respondent, I am not persuaded with the applicant's submission that Dr. Marchuk *also* diagnosed the applicant with unilateral pars defect.

[24] Lastly, I see no need to distinguish from the respondent's interpretation of *16-000087 v. Unifund Assurance Company*, because the underlying medical condition, spondylolisthesis is not present in the applicant's medical files.

[25] The applicant's injuries fall squarely within the definition of a minor injury as defined by section 3(1) of the *Schedule* and therefore, I find that the applicant's physical injuries do not warrant a removal from the MIG.

[26] The applicant's claim of a pre-existing condition is dismissed. The applicant failed to demonstrate through compelling evidence that a pre-existing condition, documented by a medical practitioner, prevents maximal medical recovery under the MIG.

Did the applicant suffer psychological injuries that warrant the removal from the MIG?

[27] An applicant may be removed from the MIG if they sustain a psychological impairment as a result of the accident, as psychological impairments are not captured within the definition of minor injuries under section 3(1) of the *Schedule*.

[28] In order to be removed from the MIG due to psychological impairments, the applicant must show that he has an actual psychological impairment and not just post-accident sequelae. A psychological diagnosis requires the progression of

[10] Windflower Diagnostic Imaging Inc., Dr. Leung, dated April 9, 2019.

ongoing, post-accident symptomatology, or clinically significant psychological impairments.

[29] I find that the applicant has not provided me with persuasive evidence to demonstrate that his alleged psychological impairments justify removal from the MIG.

[30] The applicant relies on the psychological assessment report of Lital Grinberg, psychological associate, and Dr. Peter Waxer, psychologist, dated January 27, 2020. During the assessment the applicant reported disturbances in his sleep and mood.[11] Ms. Grinberg opined that the applicant met the criteria for chronic adjustment disorder with mixed disturbance of emotions and conduct.

[31] The respondent relies on the section 44 psychological assessment of Dr. Marc Mandel, psychologist, dated July 15, 2019. Dr. Mandel completed three psychometric tests: Personality Assessment Inventory (PAI), Multidimensional Pain Inventory (MPI) and Structured Inventory of Malingered Symptoms (SIMS), concluding that there was a lack of consistent objective information provided to indicate that services are required beyond what is available within the MIG from a psychological perspective. Dr. Mandel did not diagnose the applicant with any psychological impairments.[12]

[32] The respondent also submits that the applicant did not provide any medical records that would indicate a psychological injury attributable to the accident, including no CNRs from the applicant's family physician. The only record of applicant's psychological symptoms is self-reported in the psychological assessment report of Ms. Grinberg.

[33] After considering the evidence and submissions from the parties, based on a balance of probabilities I find that the applicant has not met his evidentiary onus to demonstrate that he suffers from a psychological impairment as a result of the accident. I am persuaded by the respondent's argument that Ms. Grinberg's assessment relied almost entirely on the self-reported measures of the applicant. I am persuaded by the clinical interview and psychological testing by Dr. Mandel and find that the applicant does not have a substantial psychological impairment as a result of the accident.

[34] The applicant has the onus of establishing that he suffered a psychological impairment sufficient to remove him from the MIG treatment limits. In this regard,

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[11] Psychological Assessment Report of Lital Grinberg and Dr. Waxer, dated January 17, 2020.
[12] Psychological IE of Dr. Mandel, dated July 15, 2019.

I cannot conclude that the applicant suffered an accident-related psychological impairment that would warrant the removal from the MIG.

THE DISPUTED TREATMENT PLANS

[35] The applicant is not entitled to the disputed treatment plans because the plans propose treatment outside of the MIG's limits. As a result, an analysis on whether the treatment plans are reasonable and necessary is not required.

INCOME REPLACEMENT BENEFITS

[36] Section 5 of the *Schedule* sets out the criteria for entitlement to an income replacement benefit ("IRB"). To be eligible, an insured person must suffer a substantial inability to perform the essential tasks of their employment. The applicant[13] bears the onus of proving entitlement to an IRB on a balance of probabilities.

[37] Section 6 of the *Schedule* sets out that an insurer is not required to pay a benefit after the first 104 weeks of disability, unless, as a result of the accident, an insured person suffers a complete inability to engage in any employment.

[38] The applicant submits that he is entitled to an IRB in the amount $400.00 per week from January 9, 2019, to April 22, 2019.

[39] The applicant submits that the respondent approved and calculated the IRB benefit but claims that he has not received any funds from the applicant, with no evidence to substantiate this claim. The respondent agrees that the applicant is entitled to IRB for the time period and provides that that an IRB was paid to the applicant between January 10, 2019, and April 22, 2019, at a rate of $400.00 per week for a total of $5,828.57.[14]

[40] In addition to the letters from the respondent to the applicant regarding IRB, the respondent provides the cheque number, date of IRB payments, amount and payee information. The applicant did not comment on these documents in reply submissions.

[41] I am persuaded that both parties agree an IRB was payable to the applicant, and I am satisfied that the IRB has been paid to the respondent. Accordingly, I find

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[13] *Scarlett v. Belair Insurance Co.*, 2015 ONSC 3635.

[14] Letter to the Applicant re: IRB payable from the Respondent, dated March 18, 2019, Letter to the Applicant re: IRB payable from the Respondent dated April 8, 2019.

there is no IRB dispute between the parties and therefore no need for me to render a decision on this issue.

AWARD AND INTEREST

[42] Given that there is no unreasonable delay in payments to the applicant or overdue payments of benefits, the applicant is not entitled to an award or interest.

ORDER

[43] The application is dismissed, and I find that:

a. The applicant's injuries are predominately minor and therefore subject to the treatment within the $3,500.00 limit of the MIG;

b. The applicant was paid IRB by the respondent;

c. The treatment plans in dispute are not payable; and

d. The applicant is not entitled to an award or interest.

Released: February 15, 2023

Monica Ciriello
Vice-Chair