Citation: Mohammed v. Aviva General Insurance, 2022 ONLAT 20-014244/AABS

Licence Appeal Tribunal File Number: 20-014244/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:

Shah Mohammed

Applicant

and

Aviva General Insurance

Respondent

DECISION AND ORDER

ADJUDICATOR: **Michael Beauchesne**

APPEARANCES:

For the Applicant: Joshua David, Counsel (initial submission)
Chaitanaya Ghai, Counsel (reply submission)

For the Respondent: Christina Chiu, Counsel

HEARD: **By way of written submissions.**

REASONS FOR DECISION AND ORDER

BACKGROUND

[1] The applicant was involved in an automobile accident on **January 9, 2020**, and sought benefits per the Statutory Accident Benefits Schedule, *Effective - September 1, 2010 (including amendments effective June 1, 2016)*[1] ("*Schedule*"). The applicant was denied certain benefits by the respondent and applied for relief to the Licence Appeal Tribunal—Automobile Accident Benefits Service ("Tribunal").

PRELIMINARY ISSUE

[2] The respondent accused the applicant of "trial by ambush," and asserts that certain disclosures[2] made by the applicant were not served per the case conference report and order, dated April 23, 2021. The applicant submits that his late disclosure did not prejudice the respondent, and that the respondent was well within its rights to request time to review that evidence.

[3] Rule 9.4 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* as amended *("Rules"),* provides a party may not rely on evidence without the consent of the Tribunal if it does not follow the rules, directions, or orders with respect to disclosure.

[4] I find the applicant may rely on the disputed evidence. Although the applicant acknowledges he disclosed this evidence late by serving it on the respondent at the same time as his hearing submission, I am not persuaded this was prejudicial to the respondent. This is because the respondent did not supply evidence of a motion to exclude the evidence upon receipt, nor did it supply evidence of an adjournment request to consider this new information. In fact, the respondent submits only that it had no prior information, knowledge, or belief that these documents existed; it did not advance any argument as to how or if this late disclosure affected its ability to respond to the position taken against it.

SUBSTANTIVE ISSUES

[5] The substantive issues to be decided are:

[1] O. Reg. 34/10.
[2] Pages 299 to 302 and 304 to 466 of the applicant's document brief.

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 of the Minor Injury Guideline ("MIG")?

b. Is the applicant entitled to a medical benefit for $2,670.75 ($2,878.00 less $207.25 approved), for physiotherapy treatment proposed by East-to-West Wellness in a treatment plan, dated September 16, 2020?

c. 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?

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

RESULT

[6] I find the applicant's injuries are subject to treatment within the MIG.

[7] I find the applicant is not entitled to $2,670.75 for physiotherapy treatment, nor interest on this amount.

[8] I find the applicant is not entitled to an award.

POSITION OF THE PARTIES

Applicant

[9] The applicant submits he sustained injuries from the accident that cause ongoing significant and severe pain. He describes the pain he experiences as worsening, and attributes this to a pre-existing medical condition as well as lack of continuous treatment owing to the respondent's denial of the disputed medical benefit. The applicant implies his pain is now chronic and adds that further treatment is recommended by his assessing practitioners.

[10] The applicant also claims the respondent has ignored or failed to meet its obligations to:

a. Readdress the applicant's treatment plans, chronic pain assessment, and a non-earner benefit;

b. Produce clinical notes and records from s. 44 examiners; and

c. Consider and review the medical evidence in its entirety when contemplating the applicant's removal from the MIG.

Respondent

[11] The respondent submits the applicant has not substantiated he has pre-existing medical conditions that prevents maximal medical recovery within the MIG, as there has been no material change in his level of impairment post-accident, and no sign of worsening pain. Further, the respondent disputes the applicant's ongoing pain symptomology as a basis for removal from the MIG because the applicant has not substantiated that he suffers from chronic pain with persuasive evidence.

[12] The respondent explains the disputed treatment plan was partially approved—up to the $3,500.00 MIG limit—and therefore the applicant is not entitled to further treatment. The respondent further asserts the applicant's medical record does not have compelling evidence of ongoing impairment that would reasonably need treatment outside the MIG for his accident-related injuries.

[13] The respondent argues it had bona fide grounds for maintaining its denials, and that an award should not be granted because its differing view of the file delayed payment. The respondent explains it met the expected standard of reasonableness because, for each denial, the respondent followed the *Schedule* and relied on all medical evidence available to it.

ANALYSIS

Removal from the MIG (pre-existing condition)

[14] Section 18 (2) of the *Schedule* says an applicant will be removed from the MIG if the applicant's health practitioner finds—and supplies compelling evidence—that the applicant has a pre-existing medical condition. That condition must have been documented by a health practitioner before the accident. Further, the condition must be shown to prevent the applicant from achieving maximal recovery from the minor injury. The applicant bears the onus of proving this.

[15] I am persuaded the applicant had pre-existing medical conditions; however, I find the applicant has not shown these conditions prevent him from achieving maximal recovery within the MIG limits. My reasons for this finding follow.

[16] The applicant's pre-existing conditions were first documented in the clinical notes and records of Dr. Satok (the applicant's family physician) on February 26, 2018. These conditions were sustained after a separate and earlier accident, and included injuries to his lower back, left hip and left shoulder that caused musculoskeletal pain. Dr. Satok observed the applicant's shoulders and neck had

full range of motion and documented decreased flexion and extension in the applicant's back due to pain and tenderness in the lumbar region. Dr. Satok recommended physiotherapy heat, stretching, and Naproxen.

[17] There are later clinical notes and records[3] from Dr. Satok that show ongoing pain caused by these injuries up to December 2018. Those reports also show the applicant's pain was largely improving during this time, and include the following details:

a. The applicant started chiropractic treatment by March 2018, which reportedly helped pain in his left shoulder and hip. Dr. Satok observed the applicant's shoulders had a full range of motion with no tenderness, and that pain symptomology was slightly improved. Dr. Satok recommended continued therapy.

b. Later that same month, Dr. Satok reported the applicant was doing massage and physiotherapy. Pain persisted in the applicant's left hip, but his shoulder pain had improved.

c. In April 2018, Dr. Satok notes that therapy was helping the applicant's ongoing back pain.

d. The applicant was still complaining of ongoing neck and back pain in June 2018, and Dr. Satok noted tenderness throughout his back.

e. Dr. Satok's July 2018 records note the applicant was feeling well and there were no complaints of pain related to the applicant's accident-related injuries.

f. The next report of a medical visit to Dr. Satok is in October 2018 at which time the applicant shared his right lower back remained sore from the accident. The applicant again credited massage and physiotherapy with helping him.

g. The following month, the applicant reported feeling well and voiced that his once-per-week massage therapy sessions were providing relief from ongoing back pain.

[3] These include reports by Dr. Satok, dated March 5, 2018; March 15, 2018; April 3, 2018; June 12, 2018; October 9, 2018; November 6, 2018; December 4, 2018

h. In December 2018, the applicant was still complaining of pain caused by his accident-related injuries, which he described as occurring on the right side of his neck and down both sides of his back to his tailbone (sacrum). Dr. Satok observed the applicant's back had a full range of motion, although neck flexion was decreased. He recommended the applicant continue with massage and physiotherapy.

[18] Although the foregoing evidence shows the applicant had pre-existing conditions, I cannot conclude they prevent him from achieving maximal recovery within the MIG limits. This is because it appears more likely that the applicant's symptomology and functional impairments had all but resolved well before the applicant's January 2020 accident.

[19] Indeed, none of the post-December 2018 notes and records[4] in evidence from Dr. Satok—which span a seven-month period from January 2019 to July 2019—speak to the applicant's pre-existing conditions. Although joint soreness at various sites was voiced by the applicant in June 2019, there are no complaints of ongoing musculoskeletal pain caused by his 2018 accident-related injuries. There are no examinations or findings of physiological impairment. There are no recommendations for more therapy or indications of ongoing therapy.

[20] This is consistent with the treatment progress made by the applicant up to December 2018. Although pain was ongoing up to that point, Dr. Satok's records show it had clearly responded and improved with treatment. There is little evidence to suggest that maximal recovery had not already been achieved by January 2020 when the applicant sustained new accident-related injuries.

[21] Although the applicant's submission mentions accident-related bilateral shoulder pain reported to Dr. Satok on August 16, 2019, this report does not appear in Tab 3 of the applicant's document brief as indicated, and I therefore assign it less weight.

[22] In short, the consistent pattern of reporting on pre-existing conditions subsided greatly for a prolonged period that extends up to the date of loss in the application before the Tribunal. This breaks the link between the applicant's pre-existing conditions and his accident-related injuries of January 2020. I therefore cannot find that the applicant's pre-existing conditions would prevent his maximal medical recovery if subjected to MIG limits.

[4] These are clinical notes and records dated January 15, 2019; April 12, 2019; June 13, 2019; and July 19, 2019.

Removal from the MIG (chronic pain)

[23] An applicant who relies on chronic pain to be removed from the MIG bears the onus of showing that accident-related chronic pain has resulted in functional impairment. The common approach taken to do so, is to assess whether the applicant meets three of the six criteria outlined within the American Medical Association ("*AMA*") Guides. Indeed, the chronic pain case[5] relied upon by the applicant in his submission speaks directly to the *AMA Guides* criteria for assessing chronic pain. However, neither the applicant nor the respondent made any submissions on this basis.

[24] While these *AMA* criteria are not binding on the Tribunal, they are nevertheless a useful interpretive tool—and often adopted by the Tribunal as the test for chronic pain—if an injured person claims chronic pain in absence of a formal diagnosis.

[25] Instead, the applicant submits only that his pain has worsened and persisted more than 16 months from the date of loss despite no significant gaps in his medical record; the applicant did not otherwise explain or show how his pain qualifies as chronic. Although not strictly needed, there is no mention of a chronic pain diagnosis by a qualified medical professional in the applicant's submission.

[26] In fact, the only medical evidence before the Tribunal that speaks to chronic pain is the s. 44 insurer's examination[6] conducted on June 3, 2021, and July 7, 2021.

[27] Dr. Todd Walters (general practitioner) conducted part of this multi-disciplinary examination and concluded the applicant was not suffering from chronic pain, and that a chronic pain assessment was not needed. His findings on this matter were unsubstantiated in his report; no rationale or analysis was offered to explain this conclusion and this evidence therefore carried little weight.

[28] Mr. Robert Campos (occupational therapist) conducted an in-home assessment to support the examination, and concluded the applicant showed sufficient mobility, range of motion, strength—as well as cognitive and psychosocial functioning—to resume his normal activities of daily living.

[29] I prefer the evidence of Mr. Campos to that provided in the OCF-3 forms ("disability certificates") completed by physiotherapists Priyanka Bochia (dated January 30, 2020) and Krishan Sood (dated April 4, 2021). This is because Mr. Campos' assessment of functional ability includes objective observations and

[5] *Hagley v. Intact Ins. Co*., 2021 CanLII 69278 (ON LAT)
[6] Multidisciplinary assessment report issued on July 15, 2021, by Dr. Todd Walters (General Practitioner) and Robert Campos (Occupational Therapist).

clinical measures made in real-life scenarios that are not reflected in the disability certificates. That said, the reports of Mr. Campos, Ms. Bochia, and Ms. Sood offer little reliable insight into chronic pain. This is because their assessments were not performed to assess chronic pain specifically, and there is no evidence any of these professionals have any experience or qualifications suited to assessing chronic pain.

[30] In short, I am not persuaded that the applicant suffers from chronic pain because his submission on the matter was not supported by the medical evidence before the Tribunal. Therefore, I do not find that the applicant's injuries and pre-existing conditions require removal from the MIG due to chronic pain.

Medical benefit for $2,670.75 for physiotherapy treatment

[31] The parties agree the MIG limits have been exhausted, therefore I do not need to address if the disputed treatment plan is reasonable and necessary.

Award and Interest

[32] As there are no outstanding benefits owing to the applicant, he is not entitled to interest or an award.

CONCLUSION AND ORDER

[33] The applicant's injuries are found to be within the Minor Injury Guideline.

[34] The applicant is not entitled to a medical benefit in the amount of $2,670.75 for physiotherapy.

[35] The applicant is not entitled to an award.

[36] The applicant is not entitled to interest.

Released: September 15, 2022

Michael Beauchesne
Adjudicator