Citation: Mkuhamamba v. Motor Vehicle Accident Claims Fund (MVACF), 2022 ONLAT 19-009921/AABS

Licence Appeal Tribunal File Number: 19-009921/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:

Leila Mkuhamamba

Applicant

and

Motor Vehicle Accident Claims Fund (MVACF)

Respondent

DECISION AND ORDER

VICE-CHAIR: **D. Gregory Flude**

APPEARANCES:

For the Applicant: Shohreh Rakhshannavaz, Counsel

For the Respondent: Drew T. Higginbotham, Counsel

HEARD: **By way of written submissions**

REASONS FOR DECISION AND ORDER

BACKGROUND

[1] The applicant, Leila Mkuhamamba, was involved in an automobile accident on **November 15, 2017**, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* O. Reg 34/10 ("Schedule"). The applicant and the respondent, the Motor Vehicle Accident Claims Fund ("Fund"), disagree over the benefits to which she may be entitled so the applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] The issues in dispute may be grouped into three categories: are Ms. Mkuhamamba's injuries predominantly minor such that she is subject to the $3,500 coverage limit set out in s. 18(1) of the Schedule, if Ms. Mkuhamamba's injuries are not minor, is she entitled to an attendant care benefit and several treatments and assessments as set out in treatment and assessment plans ("OCF-18"), and is Ms. Mkuhamamba entitled to a non-earner benefit because she suffers a complete inability to live a normal life?

[3] I find that Ms. Mkuhamamba suffered predominantly minor injuries in the accident. It flows from this finding that she is not entitled to an attendant care benefit and, the $3,500 limit having been largely exhausted, to any of the treatment or assessments set out in the OCF-18s. I also find there is little or no evidence that Ms. Mkuhamamba suffers from a complete inability to live a normal life, therefore she is not entitled to a non-earner benefit.

ISSUES

[4] The issues for the hearing as set out in the case conference order are:

1. 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 and in the Minor Injury Guideline?

2. Is the applicant entitled to a non-earner benefit of $185.00 per week from December 13, 2017 to November 13, 2019?

3. Is the applicant entitled to attendant care benefits of $1,170.96 per month from November 15, 2017 to date and ongoing?

4. Is the applicant entitled to $2,366.36 for physiotherapy, recommended by Focus Physiotherapy Inc. in a treatment plan (OCF-18) dated July 17, 2018?

5. Is the applicant entitled to $3,341.97 for psychological services, recommended by Andrew Shaul in a treatment plan (OCF-18) dated March 7, 2019?

6. Is the applicant entitled to $1,950.60 for assessment of attendant care needs, recommended by Verity Medical Assessments in a treatment plan (OCF-18) dated December 12, 2017?

7. Is the applicant entitled to $2,200.00 for psychological assessment, recommended by Andrew Shaul in a treatment plan (OCF-18) dated February 7, 2019?

8. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

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

[5] For Ms. Mkuhamamba to be successful in issues 3 though 7, I must first find that her injuries are not predominantly minor. Section 14 2. provides that attendant care benefits are only payable to a person whose “impairment is not a minor injury” I will focus then on the evidence regarding whether Ms. Mkuhamamba sustained a predominantly minor injury.

Applicant sustained predominantly a minor injury

[6] Entitlement to benefits under the Schedule focusses not on the injury a person sustained but on how that injury impairs the ability to function. This is clear in s. 14, the general section mandating that insurers must pay benefits, where it states: “Except as otherwise provided in this Regulation, an insurer is liable to pay the following benefits to or on behalf of an insured person who sustains an impairment as a result of an accident.” Impairment is defined in s. 3(1) of the Schedule as “a loss or abnormality of a psychological, physiological or anatomical structure or function.” Faced with this focus, Ms. Mkuhamamba must demonstrate that she has sustained impairments.

[7] The term minor injury is also defined in s. 3(1) 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.” Ms. Mkuhamamba’s physical injuries in this case are described in her Disability

Certificate (“OCF-3”) prepared by physiotherapist, Lee Mackenzie Beeforth, as “sprain and strain of cervical spine, sprain and strain of shoulder joint, sprain and strain of lumbar spine, sprain and strain of other and unspecified parts of knee.” These same types of injuries were found by the Fund’s assessor, Dr. Shafik Daramshi, who diagnosed whiplash associated disorder, Grade 1, lumbosacral musculoligamentous strain, left knee contusion and right foot plantar fasciitis. Clearly sprains and strains fall squarely with the definition of minor injury. I have no other evidence to conclude that Ms. Mkuhamamba’s physical injuries are not minor. The question is does Ms. Mkuhamamba suffer from a psychological impairment or other impairments.

[8] Ms. Beeforth went on to diagnose several psychological conditions: sleep disorder, unspecified, generalized anxiety disorder and nervousness. I am unaware of any special training or qualification Ms. Beeforth may have to make psychological diagnoses and I assign no weight to her diagnoses. Ms. Beeforth’s observations did lead to Ms. Mkuhamamba undergoing psychological examinations and I do have that evidence.

[9] Ms. Mkuhamamba submits that she does not suffer from predominantly minor injuries because of her psychological diagnosis. She also submits that continued pain from her injuries, which she characterizes as chronic pain, lifts her out of the limit in s. 18(1).

[10] In considering the applicability of the $3,500 coverage limit I note that the concept of impairment is continued in s. 18, the section addressing the monetary coverage limits dependent on the severity of impairments sustained. Section 18(1) deals with impairments arising out of minor injuries. In setting a coverage limit for these types of impairments, s. 18(1) states: “The sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed $3,500…” It is clear from the use of the qualifying word “predominantly” that s. 18(1) does not treat the definition of minor injury as a checklist, i.e. the test is not if the injury is not on the list, then the limit does not apply. In the face of a diagnosis not caught by the minor injury definition, the Tribunal must embark on an analysis to determine how the unlisted condition impairs function and the extent to which the impairment predominates. Even if I accept that Ms. Mkuhamamba has a chronic pain condition and a psychological condition, I may still find her subject to the limit if these conditions do not significantly impair her function.

[11] Looking first at the psychological evidence, there are two sources of evidence; two reports by Dr. Kelly McCutcheon, a psychologist, in the summer of 2018 and

a report by Dr. Andrew Shaul, a psychologist and Helen Ilios, a psychotherapist, in the winter of 2018/2019.

[12] Dr. McCutcheon assessed Ms. Mkuhamamba for the first time on June 14, 2018. She found Ms. Mkuhamamba to be "experiencing some mild depressive and anxious symptomology as a result of the accident but determined the conditions were subclinical and did not incapacitate Ms. Mkuhamamba. Dr. McCutcheon prepared a second report on August 8, 2018 based on a review of Ms. Mkuhamamba's medical records and reaffirmed her view that Ms. Mkuhamamba was subclinical, and Ms. Mkuhamamba's mild psychological symptoms were not limiting her function.

[13] Ms. Ilios interviewed Ms. Mkuhamamba and administered several tests on December 13, 2018. Thereafter, in a report released on February 7, 2019, Dr. Shaul diagnosed Ms. Mkuhamamba with "an Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (travelling in a vehicle)." In Dr. Shaul's view, Ms. Mkuhamamba "has continued to experience difficulties with her overall functioning since the accident."

[14] It is difficult to reconcile these two reports, but overall, I prefer the report of Dr. McCutcheon. I note that neither Dr. Shaul and Ms. Ilios nor Dr. McCutcheon refer to the extensive counselling records from Women's College Hospital that are in the record. Those records are largely supportive of Dr. McCutcheon's findings. In fact, records just before and just after Dr. Shaul's assessment show improving mood going from 7.5 out of 10 to 8 out of 10. Perhaps more significantly, the focus of Ms. Mkuhamamba's psychological complaints relates to a childhood incident and the accident is only mentioned once with no psychological impact. Contemporaneous with Dr. McCutcheon's finding in June 2018 of no clinically significant psychological condition, the notes record no clinically significant anxiety disorders on July 4, 2018. On November 28, 2018 and January 16, 2019 entries note no significant depressive symptoms.

[15] I find on a balance of probabilities that Ms. Mkuhamamba did not suffer any significant psychological impairment as a result of the accident. Consequently, there is no psychological condition to remove from the coverage limit in s. 18(1).

[16] Ms. Mkuhamamba submits that the fact that she is still suffering pain many years after the accident means she has "chronic pain" and therefore she is not subject to the minor injury limit. She relies on *16-000438 v The Personal Insurance Company*, 2017 CanLII 59515 (ON LAT) where the Tribunal stated at paragraph [28]

> For chronic pain to be more than sequelae from the soft tissues [sic] injuries enumerated in s. 3 of the *Schedule,* it must be chronic pain syndrome or continuous (in that the initial minor injury never fully healed) and it must be of a severity that it causes suffering and distress accompanied by functional impairment or disability. A diagnosis of chronic pain without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment will not meet the applicant's burden to show that chronic pain is more than mere sequelae.

[17] The Fund submits that the pain Ms. Mkuhamamba is suffering is a clinically associated sequela of her soft tissue injuries and does not fall outside the definition of minor injury. Whatever approach I take, I do not find that Ms. Mkuhamamba's continuing pain takes her beyond the minor injury definition. Even accepting that it might, I adopt the Tribunal's approach set out above. There is no convincing evidence that Ms. Mkuhamamba is suffering from any functional impairments. In his report, Dr. Shaul does relate that Ms. Mkuhamamba is functioning at a lower level. Dr. McCutcheon notes, in coming to her conclusion, that Ms. Mkuhamamba told her she was substantially self-sufficient.

[18] As I have pointed out, Dr. McCutcheon's findings are supported by contemporaneous counselling notes from Women's College Hospital. Those notes indicate that the applicant was carrying a course load at the University of Toronto, was living in shared housing with roommates where she was responsible for her own care, spent 4 days in New York City in 2018 and successfully completed a course in Swahili including a written and oral exam, earning an A+ on the reading test. Further, she was volunteering at the Hospital for Sick Children. The evidence does not paint a picture of someone suffering functional limitations due to chronic pain.

[19] Without denying that Ms. Mkuhamamba is still suffering from pain as a result of the accident, I find that the pain does not significantly impair her function and is insufficient to overcome the $3,500 limitation in s. 18(1).

Not entitled to a non-earner benefit

[20] To succeed on a claim for a non-earner benefit, Ms. Mkuhamamba must show on a balance of probabilities that, as a result of the accident, she has suffered a complete inability to live a normal life. That term is further refined in s. 3(7)(a) of the Schedule to mean "an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily

engaged before the accident." As pointed out by the Ontario Court of Appeal in *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLII) ("*Heath*"), the analysis must, of necessity, involve an analysis of Ms. Mkuhamamba's activities before the accident with particular focus on those activities she particularly enjoyed that she can no longer do compared with her with her activities post-accident. That comparative evidence is almost totally missing from the evidentiary record.

[21] The applicant relies on the report of Dr. Shaul and Ms. Ilios previously discussed. From the perspective of meeting the test for an inability to continuously engage in substantially all of the activities in which Ms. Mkuhamamba engaged prior to the accident, this report is seriously deficient, nor could it be otherwise. Dr. Shaul sets out a summary of the lifestyle information Ms. Mkuhamamba relayed to Ms. Ilios as part of the assessment. He does not, nor could he in the time allotted for an assessment, indicate in detail which activities were important to Ms. Mkuhamamba and which were not. Despite these limitations, Dr. Shaul does express an opinion on Ms. Mkuhamamba's ability to live a normal life. That opinion holds that Ms. Mkuhamamba "suffers a partial inability to carry on a normal life." The opinion falls short of the statutory test which is an inability to continuously engaged in substantially all of her pre-accident activities and Dr. Shaul's opinion does not endorse that Ms. Mkuhamamba meets that test.

[22] Similarly, Dr. McCutcheon recorded what Ms. Mkuhamamba told her about her day to day life and abilities. That record shows Ms. Mkuhamamba being substantially self-sufficient and living her normal life. I have reviewed above the contemporaneous counselling records that support Dr. McCutcheon's report above. The counselling records show Ms. Mkuhamamba carrying on life as normal, with no accident-related limitations. She is living in student housing, travelling, carrying a university course load, and attending summer school.

[23] The onus is on Ms. Mkuhamamba to show she meets the test for a non-earner benefit. She has provided me with no evidence to indicate any limitation in her lifestyle, let alone a complete inability to live a normal life.

No interest or an award under O. Reg 664

[24] Both interest and an award under O. Reg 664 are dependent on a finding that Ms. Mkuhamamba is entitled to some or all of the benefits she seeks. Since I have found that she is not entitled to payment of any benefits, there is no basis for interest or an award.

ORDER

[25] I find that Ms. Mkuhamamba is subject to the $3,500 coverage limit set out in s. 18(1) of the Schedule as she suffered a predominantly minor injury. As a result of that finding, Ms. Mkuhamamba is not entitled to:

1. an attendant care benefit of $1,170.96 per month from November 15, 2017 to date and ongoing pursuant to s. 14(2) of the Schedule.

2. $2,366.36 for physiotherapy, recommended by Focus Physiotherapy Inc. in a treatment plan (OCF-18) dated July 17, 2018 pursuant to s. 18(1), the $3,500 limit having been substantially exhausted.

3. $3,341.97 for psychological services, recommended by Andrew Shaul in a treatment plan (OCF-18) dated March 7, 2019 pursuant to s. 18(1), the $3,500 limit having been substantially exhausted.

4. $1,950.60 for assessment of attendant care needs, recommended by Verity Medical Assessments in a treatment plan (OCF-18) dated December 12, 2017 pursuant to s. 25(2).

5. $2,200.00 for psychological assessment, recommended by Andrew Shaul in a treatment plan (OCF-18) dated February 7, 2019 pursuant to s. 18(1), the $3,500 limit having been substantially exhausted.

6. Interest, as there no benefits outstanding.

7. An award under s. 10 of O. Reg 664 because no benefits were unreasonably withheld or delayed.

[26] I also find that Ms. Mkuhamamba is not entitled to a non-earner benefit as she is not completely unable to live a normal life.

[27] The appeal is dismissed.

Released: September 9, 2022

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D. Gregory Flude
Vice-Chair