Citation: Wilmot v. Aviva Insurance Company of Canada, 2024 ONLAT 21-002048/AABS

Licence Appeal Tribunal File Number: 21-002048/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:

Garth Wilmot

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

VICE-CHAIR: **Jan Dymond**

APPEARANCES:

For the Applicant: Manisa Kafai, Counsel

For the Respondent: Christina Chiu, Counsel

HEARD: **In Writing**

OVERVIEW

[1] Garth Wilmot, the applicant, was involved in an automobile accident on July 30, 2018 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by the respondent, Aviva Insurance Company of Canada, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] This matter was originally scheduled to be heard via videoconference on March 21-23, 2023. In a Motion Order dated January 6, 2023, following a preliminary issue decision that prohibited the applicant from proceeding with his claim for a non-earner benefit, the parties were granted a format change to a written hearing.

PRELIMINARY ISSUE

[3] **Applicant Document Disclosure**: The respondent submitted that the following four document productions were served late on the respondent because they were served on September 13, 2023 with the applicant's written submission for the hearing:

i. Independent Medical Examination Report by Dr. Tajedin Getahun;

ii. Clinical notes and records of Dr. Sokoluk dated February 7, 2023;

iii. Decoded OHIP summary dated January 26, 2023; and

iv. Clinical notes and records of Michael Garron Hospital dated January 9, 2023

[4] Rule 9.2 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire, Safety Commission Common Rules of Practice and Procedure, Version I (October 2, 2017)* ("the Rules") requires a party to disclose the existence of evidence intended to be relied upon at least ten days before the hearing, or at any other time ordered by the Tribunal.

[5] I have reviewed the Case Conference Order of Adjudicator Kepman that originally set this matter for both a preliminary issue hearing and a videoconference hearing on the substantive issues, as well as the January 6, 2023 Motion Order of Adjudicator Mazerolle granting the parties' request to convert the hearing format to be held in writing. Neither Order addresses

production timelines. Adjudicator Kepman's Order advised the parties of their ability to request a resumption of the case conference to address procedural matters; however, it appears that neither party exercised that option.

[6] Adjudicator Mazerolle's Order required the applicant to file his submissions and evidence 30 days in advance of the written hearing date. I find that, in the absence of other orders, Adjudicator Mazerolle's Order with respect to the filing of submissions and evidence for the written hearing applies to the disclosure of documents and things to be relied upon at the hearing.

[7] The written hearing was scheduled to be heard on October 13, 2023. The applicant submitted his evidence on September 13, 2023 – 30 days before the scheduled hearing, as required by Adjudicator Mazerolle's Order. While I acknowledge that the respondent had a short window during which to respond to the applicant's evidence, I would note that the appeal was already 936 days old at the time of the applicant's submission and that the respondent had ample opportunity to request disclosure prior to the hearing. I find that the applicant's evidence was not late filed and may be considered.

ISSUES

[8] The issues in dispute are:

i. Has the applicant sustained a minor injury as defined under the *Schedule* as a result of the accident, and is therefore subject to the $3,500 funding limit on treatment?

ii. Is the applicant entitled to payments for the cost of examinations in the amount of $1,669.00 for a chronic pain assessment, recommended by 101 Assessments in a treatment plan submitted on August 23, 2019 and denied by the respondent on November 7, 2019?

iii. Is the applicant entitled to payments for the cost of examinations in the amount of $2,460.00 for a psychological assessment, recommended by 101 Assessments in a treatment plan submitted on January 14, 2019 and denied by the respondent on February 21, 2019?

iv. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed payments to the applicant?

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

RESULT

[9] I find that the applicant has not met his burden to prove that his injuries require treatment beyond the MIG.

[10] As the MIG limits have been exhausted, the applicant is not entitled to any of the treatment plans at issue.

[11] As the applicant is not entitled to the disputed treatment plans, the applicant is not entitled to an award under Ontario Regulation 664.

[12] As no overdue benefits are payable, the applicant is not entitled to interest.

ANALYSIS

The applicant's injuries are predominantly minor and the MIG applies:

[13] I find that the applicant has not met the onus of establishing that his injuries are not predominately minor as defined in s.3 of the *Schedule* and he is therefore subject to treatment within the $3,500.00 MIG limit.

[14] Section 18(1) of the Schedule provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured person sustains impairments that are predominantly a minor injury. Section 3(1) 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.

[15] Neither party identified in their submission whether the applicant had exhausted his benefits; however, the Explanation of Benefits documents submitted as evidence indicate that the applicant has exhausted the limits payable for medical and rehabilitation benefits under the MIG.

[16] Individuals may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under section 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[17] The applicant argues that he is not subject to the $3,500.00 MIG limit on benefits on the following grounds:

i. **Severity of injuries**: the applicant submits that medical documentation reveals a persistent and severe nature of his injuries which extend beyond the scope of minor injuries typically associated with the MIG;

ii. **Ongoing pain and limitations**: the applicant submits that consistent complaints of lower back pain, stiffness, and radiating leg pain, even after extensive medical treatment and therapy demonstrate the chronic nature of his injuries;

iii. **Degenerative changes**: the applicant submits that diagnostic imaging has consistently identified degenerative changes in his spine, further confirming the existence of significant underlying conditions; and

iv. **Consultation with a specialist**: the applicant submits that his referral to Dr. Craig A. Sokoluk, a rheumatologist, corroborates the need for specialized care and evaluation of the applicant's condition, underscoring the complexity of his case.

[18] The respondent submits that the applicant has not provided evidence that the degenerative changes the applicant is experiencing are linked to the accident and contends instead that they are age-related. The respondent also argues that the absence of any record of the applicant having visited his family physician for accident-related complaints in 2019 or 2020 speaks against the applicant's claim of consistently documented complaints. The respondent further argues that the applicant has failed to provide evidence that his 2021 complaints of back pain are accident- related and argues instead that they were work-related.

[19] **Severity of Injuries**: I find that the medical evidence supports the respondent's determination of the applicant's injuries as being predominantly minor.

[20] Section 3(1) 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** (emphasis added).

[21] The applicant first sought medical treatment for his injuries on July 31, 2018. The clinical notes and records ("CNRs") of Dr. Jameel Razack note that the applicant was involved in a motor vehicle accident the previous day and record the applicant as complaining of neck and lower back stiffness with painful range of motion. Dr. Razack notes evidence of posterior neck and bilateral lumbar spasm.

[22] The OCF-3 completed by Ayden Banibashar, chiropractor, on August 7, 2018 is consistent with the findings of Dr. Razack. Dr. Banibashar listed the following injuries with an expected duration of 9 -12 weeks:

i. Sprain and strain of joints and ligaments of lumbar spine and pelvis;

ii. Injury of muscle and tendon of neck level, and

iii. Sprain and strain of right wrist.

[23] I find that the applicant's injuries as sustained at the time of the accident are predominantly minor and subject to treatment within the Minor Injury Guideline.

[24] **Chronic nature of complaints:** The applicant asserts that documented consistent complaints of lower back pain, stiffness and radiating leg pain demonstrate the chronic nature of his injuries; however, chronicity is not grounds for removal from the MIG. Indeed, an injured person who has achieved maximal recovery within the MIG limits may continue to experience residual complaints.

[25] Further, in his submissions, the applicant does not point me to medical records supporting his position that these complaints are consistent and/or a result of injuries sustained in the accident.

[26] As noted in paragraph 18 above the respondent argues that the applicant has failed to demonstrate consistently documented complaints or that his 2021 complaints of back pain are accident related.

[27] I agree with the respondent that the applicant has not demonstrated that his claimed ongoing complaints are accident-related and warrant removal from the MIG.

[28] **Degenerative changes:** The applicant relies on diagnostic imaging confirming degenerative changes in the spine.

[29] I find that the referenced imaging reports do not support the applicant's position of significant underlying conditions that would remove him from the MIG. A report dated March 22, 2021 indicates subtle thoracic scoliosis; subtle findings of degenerative changes of the lumbosacral spine, and no abnormalities of the cervical spine.

[30] The MRI report of Michael Garron Hospital dated July 21, 2022, included in the clinical notes and records of Dr. Sokoluk, reports findings of inflammatory arthritis

of the lumbar spine and bilateral nonactive sacroiliitis associated with subchondral sclerosis and erosions.

[31] Notably, the applicant provides no evidence that the injuries sustained in the accident contributed to the applicant's conditions as set out in the MRI reports or whether they would negatively impact his ability to achieve maximum recovery. I agree with the respondent's position that the applicant has failed to demonstrate that the degenerative changes he has experienced are a result of and/or exacerbated by the accident and warrant removal from the MIG.

[32] **Consultation with a specialist:** The applicant submits that a referral to a rheumatologist (Dr. Sokoluk) corroborates his need for special care. A referral in and of itself is not evidence that carries any weight in determining whether an applicant's injuries fall outside the MIG.

[33] For the reasons set out above, I find that the applicant has not met his burden to prove that his injuries require treatment beyond the MIG.

Benefits Claimed

[34] Since I have found that the applicant's claims are subject to the treatment within the $3,500.00 limit of the MIG, and since that limit has already been exhausted, the applicant is not entitled to the benefits claimed. It is not necessary to determine whether the OCF-18s in dispute are reasonable and necessary as a result of the accident.

Award

[35] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. Since no benefits were unreasonably withheld, the applicant is not entitled to an award.

Interest

[36] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the Schedule. As there are no overdue benefits, no interest is payable.

ORDER

[37] I find that:

i. The applicant's injuries are predominately minor and therefore subject to treatment within the $3,500.00 limit of the Minor Injury Guideline.

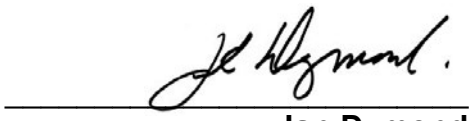
ii. As the limits of the Minor Injury Guideline have been exhausted, there is no entitlement to the benefits at issue.

iii. The applicant is not entitled to an award under s.10 of Reg. 664.

iv. No interest is payable.

[38] The application is dismissed.

Released: August 28, 2024



Jan Dymond
Vice-Chair