Citation: Thanvi v. Economical Insurance, 2023 ONLAT 21-011762/AABS

Licence Appeal Tribunal File Number: 21-011762/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:

Umer Thanvi

Applicant

and

Economical Insurance

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Maria Bihnam, Paralegal

For the Respondent: Ainsley Shannon, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Umer Thanvi, ("the applicant") was involved in an automobile accident on May 23, 2019 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 Economical Insurance ("the respondent") and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

Preliminary Issue 1- Late disclosure of the Mackenzie Medical Center Clinical Notes and Records

[2] The applicant tendered the clinical notes and records of Mackenzie Medical Center as evidence for this hearing.

[3] The respondent's counsel submits that the applicant never produced these records prior to his written submissions being submitted and that the Tribunal should exclude these records as evidence from the hearing. The respondent submits that it was prejudiced by the lack of disclosure of these records and were unable to obtain expert reports. The Case Conference Order ("Tribunal's Order") released September 14, 2022, had a deadline for the applicant to exchange these records 60 calendar days following the case conference. The respondent's counsel followed up with the applicant for these records on October 24, 2022, November 24, 2022, January 4, 2023, and March 7, 2023.

[4] The applicant in his reply submits that he submitted the clinical notes and records of Mackenzie Medical Center to the respondent directly via fax on October 31, 2022, and as such, he was compliant with the Tribunal's Order.

[5] Rule 9.4 of the Tribunal's *Common Rules* sets out that a party that fails to comply with any Rules or Orders regarding disclosure or inspection of documents or things, or lists of witnesses, that party may not rely on the document or thing as evidence, or call the witnesses to give evidence, without the consent of the Tribunal.

[6] I am permitting the clinical notes and records of Mackenzie Medical Center to be admitted as evidence for this hearing as the applicant served the records directly on the respondent. While I can appreciate that the applicant should have sent these records to the respondent's counsel as well, the Tribunal's Order stated that the applicant was to provide the respondent with the clinical notes and

records of Mackenzie Medical Center, 60 days following the case conference, which he did.

Preliminary Issue 2- Missing OCF-18s for issues 3 and 4

[7] The applicant failed to submit the OCF-18s for the issues listed as 3 and 4 as evidence for this hearing.

[8] In *J.R. v. Certas Home and Insurance Company*, 2018 CanLII 13161, on reconsideration it was determined that the Tribunal is obligated to ask parties to submit information that it believes a party meant to rely upon as evidence that formed the basis of the parties' dispute but was never filed. As such, the Tribunal reached out to both parties and requested the complete OCF-18s for issues 3 and 4 until 5:00 PM on August 23, 2023. On August 23, 2023, the parties provided copies of the OCF-18s for issues 3 and 4.

ISSUES

[9] The issues in dispute 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 ("MIG")?

2. Is the applicant entitled to $1,977.05 for physiotherapy services, proposed by Mackenzie Medical Rehabilitation Centre Inc., in a treatment plan ("OCF-18"), dated February 23, 2020?

3. Is the applicant entitled to $1,384.70 for physiotherapy services, proposed by Mackenzie Medical Rehabilitation Centre Inc., in an OCF-18 dated June 10, 2020?

4. Is the applicant entitled to $2,260.00 for a psychological assessment, proposed by Medex Assessments Inc., in an OCF-18 dated December 7, 2019?

5. Is the applicant entitled to $2,768.50 for a chronic pain assessment proposed by Medex Assessments Inc., in an OCF-18 dated October 6, 2021, and denied, October 7, 2021?

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

RESULT

[10] The applicant sustained a predominantly minor injury as a result of the accident. As the full MIG limits on medical benefits have been approved, an analysis of whether the disputed OCF-18s are reasonable and necessary is unwarranted. Further, the applicant is not entitled to interest.

ANALYSIS

The Minor Injury Guideline

[11] 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." The terms, "strain," "sprain," "subluxation," and "whiplash associated disorder" are defined in the *Schedule.*

[12] Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to $3,500.00. An applicant may receive payment for treatment beyond the $3,500.00 cap 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 a psychological impairment or chronic pain with a functional impairment. It is the applicant's burden to establish entitlement to coverage beyond the $3,500.00 cap on a balance of probabilities.

[13] The applicant submits that he should be removed from the MIG on the following grounds:

(i) The applicant suffers from chronic neck pain, left shoulder pain, left arm pain, and back pain that radiates into his hips with a functional impairment; and

(ii) He has psychological concerns following this accident.

[14] The applicant's submissions did not directly address whether his pre-existing right ankle injury would remove him from the MIG, however as this was mentioned in his submissions, I will be considering this below in my decision.

[15] The respondent submits that the medical evidence (or lack thereof) shows that the applicant sustained predominantly minor soft-tissue injuries that quickly resolved with minimal treatment. Further, the applicant has provided no evidence

of any psychological symptoms and he has not provided any evidence to contradict s. 44 assessor, psychologist, Dr. John Lee's opinion that there is no psychological diagnosis from this accident.

The applicant has not established chronic pain warranting removal from the MIG

[16] I find that the applicant has not met his burden to prove that he suffers from a chronic pain condition.

[17] None of the applicant's doctors have diagnosed chronic pain. While a diagnosis of chronic pain syndrome is not required, the presence of intermittent pain is not enough to warrant removal from the MIG. There must be evidence of severe or functionally disabling pain that is consistent and that affects day-to-day or work function. Further, the applicant does not meet the criteria for a chronic pain condition as outlined by the American Medical Association ("*AMA Guides*"). While I accept that the *AMA Guides* criteria are not a mandatory standard required to be met to establish a chronic pain condition before this Tribunal, I find it is a helpful tool for assessing chronic pain claims. As a result, I conclude that he does not suffer from accident-related chronic pain.

[18] The injuries listed in the OCF-3, dated August 9, 2019, are all MIG-type injuries except for: radiculopathy, other sleep disorders, other anxiety disorders, nervousness, irritability, and anger. I place little weight on these diagnoses as Ms. Jennifer Violante, who completed the OCF-3, is a chiropractor and it is outside of her scope of practice to comment on neurological conditions or psychological conditions. Further, there is no objective evidence to support the diagnosis of radiculopathy, such as EMG testing or diagnostic imaging.

[19] The applicant's clinical notes and records from his family physician, Dr. Rafat, do not support a finding of chronic pain as he only saw him once for his accident-related pain. On November 10, 2019, the applicant met with Dr. Rafat and did not present with any pain complaints from this accident. Further, the applicant advised that he was exercising 4-5 times per week, working, and studying. On February 14, 2023, Dr. Rafat provided the applicant with a requisition for an x-ray and ultrasound of his lumbar sacral spine. It was noted on the requisition that the applicant was complaining about back pain which radiated to his legs with numbness. An ultrasound and x-ray of the lumbar sacral spine were recommended, but the results of these diagnostic tests were not submitted into evidence, which leads me to believe they were unremarkable. While I further acknowledge the applicant complained of: lower back pain, neck stiffness/pain, mid back pain, glute discomfort, forearm pain, leg pain, and upper back pain to

the treatment providers at Mackenzie Medical Center, there is no reference to any functional limitations as a result of this pain.

[20] In his report, dated March 2, 2022, IE assessor Dr. Yuri Marchuk, psychiatrist, noted that the applicant had resumed his pre-accident employment within two weeks following the accident and returned to his studies. Further, Dr. Marchuk noted that the applicant continued to be completely independent with self-care tasks, household tasks, and home maintenance tasks and can handle heavy (greater than 44 pounds) workloads. It was further noted that the applicant was able to complete all these activities despite having pain with: prolonged sitting, prolonged walking, bending, reaching, heavy lifting, and going up the stairs. As a result, Dr. Marchuk diagnosed the applicant with MIG-type injuries which consisted of: whiplash associated disorder, bilateral shoulder myofascial dysfunction, lumbar musculoligamentous dysfunction (superimposed over pre-existing exacerbated lower back condition as per applicant) and left iliotibial band dysfunction.

[21] In his report dated August 12, 2020, IE assessor Dr. Lee noted that the applicant had returned to school and work one week following the accident without any significant problems. The applicant further advised Dr. Lee that as a result of COVID-19 he was not able to work but he was able to and willing to return to his work. In addition, Dr. Lee noted that the applicant continued to perform his pre-accident housekeeping tasks, personal care tasks, and recreational activities, including swimming and soccer, albeit it took him one month following the accident to return to swimming and playing soccer. Moreover, Dr. Lee noted the applicant was able to do all these activities despite having pain when bending down and with prolonged sitting.

[22] Given the applicant's described level of function, I am not satisfied that his pain caused a functional impairment. Although I acknowledge that the applicant has pain with prolonged sitting, walking, bending, reaching, heavy lifting, and going up the stairs, this does not rise to a level to find that the applicant suffered from an ongoing functional impairment due to pain, as he is able to complete his tasks despite the pain.

[23] Further, I find that the applicant has not met three of the six criteria for a chronic pain condition, as outlined in the *AMA Guides*. The applicant has not provided any prescription summaries, despite his submissions that he is consuming painkillers as a result of this accident. It is well-settled that submissions are not medical evidence. He is not excessively dependent on healthcare providers, spouse, or family and exhibited no secondary deconditioning due to disuse or

failure to restore pre-accident function. There is no evidence of the applicant withdrawing socially. The applicant continued to perform his pre-accident work, school, and recreational activities, and there was no compelling evidence of any psychological injury.

[24] Lastly, the authorities cited by the applicant to demonstrate that he should be removed from the MIG on the basis of chronic pain are unpersuasive. In *17-002624 v. Aviva Insurance Canada*, 2018 CanLII 13183, the applicant was diagnosed with chronic pain by her family physician, unlike this matter where there is no diagnosis of chronic pain by any doctor. Further in *18-005777 v. Northbridge Personal Insurance Corporation*, 2019 CanLII 58161, there was evidence that the applicant was treated consistently with his family physician for his accident-related pain complaints. In contrast, in this matter, the applicant only met with his family physician once following this accident for pain complaints.

[25] Considering the totality of the evidence with respect to the applicant's function, I find that he does not suffer from a chronic pain condition that would constitute an injury that is not included in the minor injury definition of the *Schedule*.

The applicant does not suffer from psychological injuries which would remove him from the MIG

[26] The applicant has failed to prove on a balance of probabilities that he suffers from a psychological impairment that will remove him from the MIG.

[27] The OCF-18 dated December 7, 2019, and OCF-3 dated August 9, 2019, are insufficient evidence to establish that the applicant has a psychological impairment following this accident. The applicant is relying on the OCF-18, dated December 7, 2019 submitted by Dr. Silvia Tenenbaum, psychologist, to support that he has psychological concerns following this accident which warrant removal from the MIG. I am not persuaded by the OCF-18, dated December 7, 2019, as there are no entries from Dr. Rafat where the applicant complained of any psychological symptoms that arose from this accident. Moreover, Dr. Rafat's clinical note and record, dated November 10, 2019, notes that the applicant had no concerns with anxiety or depression. I also place little weight on the OCF-3, dated August 9, 2019, as it is outside the scope of practice of a chiropractor to comment on psychological conditions.

[28] Additionally, the applicant has failed to demonstrate that his psychological complaints of tension, stress, and disrupted sleep to Dr. Lee are not mere sequelae of his physical injuries. In his report dated August 12, 2020, Dr. Lee noted that the applicant advised he felt tension and stress due to pain from the

accident. Further, the applicant advised Dr. Lee that he had disrupted sleep following the accident due to pain and the applicant confirmed that he had no nightmares or flashbacks of the accident. Dr. Lee concluded that the applicant's reports of stress and tension were in response to pain and did not reflect a psychological impairment or rise to a level of a psychological disorder. The applicant has failed to refer to a single entry of Dr. Rafat that supports that he has a psychological impairment following this accident or any medical evidence that rebuts Dr. Lee's opinion.

[29] Based on the totality of the evidence, I find that the applicant has failed to demonstrate that he suffers from a psychological impairment from this accident.

The applicant does not have a pre-existing condition that will prevent maximal recovery within the MIG

[30] The applicant is not removed from the MIG as a result of a pre-existing condition, as he has failed to prove on a balance of probabilities that his pre-existing condition would prevent maximal recovery within the MIG.

[31] The standard for excluding an impairment on the basis of a pre-existing condition(s) is well-defined and strict. A pre-existing condition will not automatically exclude a person's impairment from the MIG: it must be shown to prevent maximal recovery within the funding limit imposed by the MIG.

[32] The applicant has failed to demonstrate that his pre-existing right ankle injury would prevent recovery within the MIG limits. The last time, the applicant presented with right ankle pain to Dr. Rafat was on June 21, 2018 (11 months before the accident) and the applicant has failed to refer to a single entry where he complained of right ankle pain following this accident. As such, I find that there is no evidence that the applicant's right ankle was aggravated by this accident, and as a result he cannot recover within the MIG.

[33] The applicant's submissions did not address his self-reporting of pre-existing lower back pain to Dr. Marchuk nor his pre-accident stuttering issues to Dr. Lee. However, as this is in the evidence that is available to both parties, I have addressed whether these pre-existing conditions would remove the applicant from the MIG. I find that the applicant is not removed on the basis of his alleged pre-existing lower back pain, as there is no evidence beyond his self-reporting that supports this. Dr. Rafat's clinical notes and records did not have a single entry wherein the applicant complained of lower back pain prior to this accident. In addition, the applicant advised Dr. Lee that his stuttering has remained the

same following the accident, as such, he has failed to demonstrate that he cannot recover within the MIG as a result.

[34] Based on the totality of the evidence, I find that the applicant has failed to demonstrate that he should be removed from the MIG on the basis of a pre-existing condition.

OCF-18s and Interest

[35] Having found that the applicant sustained a minor injury as a result of the accident, it follows that he is not entitled to the disputed OCF-18s as the full MIG limits have been approved.

[36] Likewise, interest is only payable on overdue payment of benefits pursuant to s. 51 of the *Schedule.* Having found that the applicant is not entitled to the disputed OCF-18s, no payments are overdue, and thus no interest is payable.

ORDER

[37] The applicant sustained a predominantly minor injury as a result of the accident. As the limits have been fully approved, he is not entitled to payment for the OCF-18s in dispute or interest. Thus, the application is dismissed.

Released: September 19, 2023

Tanjoyt Deol
Adjudicator