Citation: Macaraeg v. Economical Insurance, 2024 ONLAT 22-000911/AABS

Licence Appeal Tribunal File Number: 22-000911/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:

Maria Caroline Macaraeg

Applicant

and

Economical Insurance

Respondent

DECISION

ADJUDICATOR: **Tanjoyt Deol**

APPEARANCES:

For the Applicant: Mike Pryce, Paralegal

For the Respondent: Jeremy Hanigan, Counsel

HEARD: **By Way of Written Submissions**

OVERVIEW

[1] Maria Caroline Macaraeg (the "applicant") was involved in an automobile accident on September 22, 2020, 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.

[2] The respondent in its initial submissions, raised a preliminary issue of whether the applicant was barred from proceeding with this application pursuant to s. 55(1)2 of the *Schedule*, which has been added as an issue in dispute for this hearing.

PRELIMINARY ISSUE IN DISPUTE

[3] The preliminary issue to be decided is:

1. Is the applicant barred from proceeding with the application on the basis that she failed to comply with section 44 of the *Schedule* per section 55(1)2 of the *Schedule*?

SUBSTANTIVE ISSUES IN DISPUTE

[4] The following substantive issues are in dispute:

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 Minor Injury Guideline limit ("MIG")?

2. Is the applicant entitled to an income replacement benefit ("IRB") in the amount of $139.74 per week from August 19, 2021, to date and ongoing?

3. Is the applicant entitled to $4,231.75 for physiotherapy services, proposed by Body Dynamics Inc., in a treatment plan/OCF-18 ("OCF-18") submitted September 29, 2020, and denied on October 27, 2020?

4. Is the applicant entitled to $3,312.09 for physiotherapy services, proposed by Body Dynamics Inc., in an OCF-18 submitted June 15, 2021, and denied on July 20, 2021?

5. Is the applicant entitled to $3,584.90 for physiotherapy services, proposed by Body Dynamics Inc., in an OCF-18 submitted January 26, 2021, and denied on February 25, 2021?

6. Is the applicant entitled to $2,200.00 for a psychological assessment, proposed by Body Dynamics Inc., in an OCF-18 submitted January 13, 2021, and denied on June 15, 2021?

7. Is the applicant entitled to $2,413.00 for a chronic pain assessment, proposed by Dr. Igor Wilderman in an OCF-18 submitted January 28, 2022, and denied on February 2, 2022?

8. Is the applicant entitled to $2,200.00 for an orthopaedic assessment, proposed by Joseph Kwok in an OCF-18 submitted February 2, 2022, and denied on February 16, 2022?

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

RESULTS

[5] With respect to the preliminary issue, the applicant is not barred from proceeding forward with the issues in dispute, as detailed below.

[6] With respect to the substantive issues, I find that:

i. The applicant sustained a minor injury as a result of the accident, as defined in section 3 of the *Schedule.* She is therefore subject to the MIG and the $3,500.00 funding limit on treatment.

ii. The applicant is not entitled to IRB.

iii. The applicant is entitled to whatever amount remains within the $3,500.00 MIG limit as of the date of this decision, as such benefits that have been incurred under the MIG are deemed reasonable and necessary pursuant to s. 40(8) of the *Schedule*. Interest applies to the payment of overdue benefits in accordance with s. 51 of the *Schedule*.

ANALYSIS

The applicant is not barred from proceeding with her claim

[7] I find that the applicant is not barred from proceeding forward with the issues in dispute, due to her failure to attend the scheduled insurer's examination ("IE") on March 15, 2023.

[8] Section 44 of the *Schedule* permits an insurer to examine an insured person by one or more regulated health professionals (or a vocational rehabilitation expert) to determine whether the insured person is, or continues to be, entitled to a benefit. Section 44 provides certain requirements for an insurer to comply with in order to evoke its rights to an IE.

[9] The requirements for a Notice of Examination are set out in section 44(5) of the *Schedule*:

> If the insurer requires an examination under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,
>
> a. the medical and any other reasons for the examination;
>
> b. whether the attendance of the insured person is required at the examination;
>
> c. the name of the person or persons who will conduct the examination, any regulated health profession to which they belong and their titles and designations indicating their specialization, if any, in their professions; and
>
> d. if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days.

[10] Pursuant to s. 55(1)2 of the *Schedule*, an applicant shall not apply to the Tribunal if the insurer has provided the insured person with notice that it requires an examination under s. 44, but the insured person has not complied.

[11] The respondent in its initial submissions raised a preliminary issue with respect to the applicant being non-compliant with s. 44, as she did not attend an IE which was scheduled for March 15, 2023. The respondent further submits that the IE was scheduled with Dr. A. Rubenstein, psychologist, to address entitlement for a treatment plan for a psychological assessment, which is listed as issue six in the within hearing. As a result, its position is that pursuant to s. 55, the applicant is not entitled to dispute any of the issues in dispute, as she failed to attend a properly scheduled IE. Lastly, the respondent submits that as a result of the applicant's non-attendance it could not properly assess the applicant's entitlement to benefits under the *Schedule*. To this end, it relies upon its correspondence, dated June 15, 2021, and February 17, 2023.

[12] The applicant did not provide any reply submissions.

[13] The *Schedule* is clear that the applicant has a duty to participate in each in-person IE that is reasonably necessary and for which there is a *Schedule*-compliant notice. The respondent must first prove that a Notice of Examination complies with s. 44(5) of the *Schedule* in order for it to rely on it as a basis to seek a statute bar under s. 55. When seeking such a remedy, the respondent must ensure that it provides specific details of the applicant's conditions, the benefit in dispute and any section it relies upon. The reasons must be clear enough so that the applicant can make a well-informed decision on whether to attend the examination.

[14] I find that the respondent's correspondence dated February 17, 2023, did not comply with s. 44(5) of the *Schedule*, as it failed to provide a medical and any other reason for the examination. In its correspondence, dated February 17, 2023, it acknowledged receipt of updated documentation and advised that it had scheduled an IE to determine if the updated documentation changed the assessor's opinion.

[15] It is well-settled that the insurer's medical and any other reasons should include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires. Here, the respondent did not provide any specific details about the applicant's condition, nor did it refer to any details outlined in the updated medical documentation. Thus, in my view, this correspondence was not clear enough to allow the applicant to make a well-informed decision on whether to attend the examination.

[16] Moreover, the respondent in its previous correspondence dated June 15, 2021, pertaining to the other scheduled IEs provided detailed information regarding the applicant's condition and impairments. In particular, it noted that the applicant has back pain, and made reference to the medical records, like the records of her family physician, and MRIs. Therefore, I do not find that this was a situation where no medical documentation had been provided, which limited the respondent's ability to provide a medical reason or specify what additional information was still required from the applicant.

[17] In order for an insurer to invoke its s. 44 right to an IE, it must first provide a legally sufficient notice pursuant to s. 44(5). If the respondent's notice does not comply with section 44(5), an insurer cannot rely on the remedy available in section 55 of the *Schedule* to bar an insured's application from proceeding before the Tribunal.

[18] Given that I have found that the NOE was deficient, it is not necessary for me to embark on an analysis as to whether the IE was reasonably necessary and whether the applicant had a reasonable explanation for her non-attendance.

[19] For the reasons cited above, I find that the applicant is not barred from proceeding with respect to entitlement to IRB, the determination of MIG, and the treatment plans in dispute.

The applicant has not demonstrated that she should be removed from the MIG

[20] I find that the applicant has not met her burden to prove that she suffers from a chronic pain condition.

[21] 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."

[22] An insured person may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 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.

[23] In all cases, the burden of proof lies with the applicant.

[24] The applicant submits that she was diagnosed with chronic pain syndrome but fails to direct me to where in the evidence the diagnosis is provided.

[25] I also note that the cost of a psychological assessment is in dispute, and the applicant tendered a s. 25 psychological assessment completed by Dr. Ricardo Harris, psychologist, dated February 3, 2021, as evidence in her brief. However, the applicant's submissions were silent on whether she was seeking removal from the MIG on this basis, nor did she address the legal test to do so. As the onus is on the applicant, and she has not advised whether she is seeking removal from the MIG on the basis of a psychological impairment, I will not be addressing this in my decision.

[26] In response, the respondent submits that the medical evidence clearly demonstrates that the applicant sustained predominantly minor injuries that

quickly healed, and as such her injuries are classified within the definition of a minor injury. To support its position, the respondent relies upon the s. 44 assessments of Dr. Mohamed Khaled, general physician, dated July 15, 2021.

[27] Contrary to the applicant's submissions, I was unable to locate a diagnosis of chronic pain syndrome or chronic pain in the records. Chronic pain can be established without a formal diagnosis if there is sufficient evidence of ongoing pain, accompanied by functional impairment or disability. I find no compelling evidence demonstrating that the applicant suffers from an ongoing functional impairment due to accident-related pain. As a result, I conclude that the applicant has not demonstrated that she suffers from a chronic pain condition as a result of the accident.

[28] The applicant was taken to Humber River Hospital, on the day of the accident. X-rays were noted to be unremarkable, and she was diagnosed with back pain.

[29] Despite the applicant's submission, the records of her family physician, Dr. Oluwole Abebajo do not support that she was diagnosed with chronic pain syndrome. Nor do the records support that the applicant has chronic pain with an ongoing functional impairment. First, the applicant was not diagnosed with chronic pain syndrome by Dr. Adebajo, instead on September 28, 2020, October 29, 2020, February 19, 2021, and November 11, 2021, Dr. Adebajo diagnosed the applicant with musculoskeletal back pain, which fits the *Schedule's* definition of "minor injury".

[30] Second, Dr. Adebajo's records do not demonstrate that the applicant has an ongoing functional impairment due to her back pain. For example, I acknowledge that on September 28, 2020, and October 29, 2020, Dr. Adebajo conducted a physical examination which was largely unremarkable, albeit it was noted that the applicant had slow movement in her gait. However, by November 24, 2020, Dr. Adebajo noted that the applicant's gait had returned to normal. In the subsequent entries, dated November 30, 2020, February 10, 2021, February 17, 2021, June 28, 2021, and November 11, 2021, while the applicant reported ongoing back pain, there was no reference to whether this resulted in an ongoing functional impairment. Nor did Dr. Adebajo provide a medical opinion of whether the applicant has an ongoing functional impairment as a result of her alleged chronic pain. Indeed, in the last accident-related visit (November 11, 2021), Dr. Adebajo noted that the applicant's gait was normal.

[31] Third, the applicant's last accident-related visit with Dr. Adebajo is November 11, 2021, which further weakens her claim that she has chronic pain from this accident. In my opinion, if the applicant was experiencing ongoing pain, it begs

the question why she did not see her family physician since November 11, 2021, for treatment or a referral to a specialist?

[32] Also, the records of Body Dynamics Physiotherapy do not support the applicant's position that she was diagnosed with chronic pain syndrome. Despite, the applicant's submission that she was diagnosed with chronic pain syndrome, I was unable to locate this diagnosis in the records.

[33] Furthermore, I acknowledge that on September 29, 2020, it was noted by the applicant's treating practitioners at Body Dynamics Physiotherapy that she was unable to sit due to her pain, and that on November 24, 2020, Dr. Rohani noted that the applicant could not tolerate prolonged sitting. However, as noted above, Dr. Adebajo's records show that the physical examinations were largely unremarkable, albeit there was initially slow movement in her gait which resolved by November 24, 2020. Moreover, Dr. Adebajo did not provide an opinion of whether the applicant's lower back pain resulted in an ongoing functional impairment.

[34] I am also persuaded by the s. 44 report of Dr. Khaled for the following reasons. First, Dr. Khaled's review of the medical evidence was comprehensive. Second, Dr. Khaled conducted a physical examination which did not reveal any valid indicators to support residual or ongoing permanent musculoskeletal, neurological, or orthopaedic accident-related injury or impairment. Third, Dr. Khalid's findings are supported by the medical record. His conclusion that the applicant has mechanical lower back pain and grade 2 whiplash of the neck, which are uncomplicated soft tissue injuries, is reflected in the records of Dr. Adebajo.

[35] For the sake of completeness, I note that the MRI of the pelvis, dated February 8, 2021, and MRI of the lumbar spine, dated February 16, 2021, revealed: mild degenerative disease of the sacroiliac joints, left greater than right; minimal bulging at L5-S1 and L4-5; and mild degenerative disc disease at L2-3, and L3-4. However, the applicant has not directed me to a medical opinion that establishes a connection between these results and the alleged chronic pain. In fact, on February 17, 2021, when Dr. Abejao reviewed the respective results of these MRIs, he made no reference to the accident.

[36] I find that the applicant has not established on a balance of probabilities that her injuries warrant removal from the MIG.

The Treatment Plans

[37] As I have found the applicant to remain within the MIG, I find that it is not required to review the treatment plans in dispute to determine if they are reasonable and necessary.

[38] However, the applicant is entitled to whatever amount remains within the $3,500.00 MIG limit as of the date of this decision, as such benefits that have been incurred under the MIG are deemed reasonable and necessary pursuant to s. 40(8) of the *Schedule*. Interest applies to the payment of overdue benefits in accordance with s. 51 of the *Schedule*.

The applicant has not established entitlement to IRB

[39] I find that the applicant has not met her burden to prove her entitlement to IRB.

[40] Entitlement to an IRB is set out in sections 5 and 6 of the *Schedule*. Section 5(1)1(i) provides that the benefit is payable if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. Section 6(1) provides that the benefit is payable for the period in which the insured person suffers a substantial inability to perform the essential tasks of her employment or self-employment.

[41] Section 6(2) provides that the benefit is only payable after 104 weeks of disability if, as a result of the accident, the person suffers a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

[42] The applicant bears the onus of demonstrating on a balance of probabilities that she is entitled to an IRB.

[43] Problematically, despite IRB being listed as a live issue in dispute in the CCRO, the applicant's submissions were completely silent with respect to why she would be entitled to IRB, nor did she point me to evidence that supports her entitlement to this claim.

[44] The respondent submits that the applicant has failed to provide evidence of her eligibility for IRB, despite electing for same. Furthermore, the respondent submits that prior to the accident, there is a history of poor work performance which resulted in disciplinary measures on September 10, 2019, March 13, 2019, and March 28, 2019. Subsequently, the applicant stopped working as a result of her disciplinary measure on February 16, 2020 (which is prior to this accident).

[45] The applicant had a further opportunity to address this in her reply submissions, but she chose not to do so.

[46] The applicant cannot ask the Tribunal to connect the dots and make her case. Doing so inappropriately places the Tribunal in the role of her advocate. It is up to the applicant to provide submissions on entitlement to IRB and make specific citations in the evidence and explain why it supports entitlement to IRB. Consequently, I find that the applicant is not entitled to IRB for the period of August 19, 2021, to date and ongoing.

ORDER

[47] For the reasons outlined above, I find that:

i. The applicant sustained a minor injury as a result of the accident, as defined in section 3 of the *Schedule.* She is therefore subject to the MIG and the $3,500.00 funding limit on treatment.

ii. The applicant is not entitled to IRB.

iii. The applicant is entitled to whatever amount remains within the $3,500.00 MIG limit as of the date of this decision, as such benefits that have been incurred under the MIG are deemed reasonable and necessary pursuant to s. 40(8) of the *Schedule*. Interest applies to the payment of overdue benefits in accordance with s. 51 of the *Schedule*.

iv. The application is dismissed.

Released: March 13, 2024

Tanjoyt Deol
Adjudicator