Citation: Hassan v. Economical Insurance Company, 2024 ONLAT 22-004728/AABS

Licence Appeal Tribunal File Number: 22-004728/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:

Halimo Hassan

Applicant

And

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Gareth Neilson**

APPEARANCES:

For the Applicant: Sarah Brown, Paralegal

For the Respondent: Jeremy Hanigan, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Halimo Hassan, the applicant, was involved in an automobile accident on December 19, 2021, 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 and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. 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 (MIG) limit?

ii. Is the applicant entitled to a non-earner benefit (NEB) of $185.00 per week from January 16, 2022 to date and ongoing?

iii. Is the applicant entitled to $1,303.43 for physiotherapy services, proposed by HealthMax Etobicoke in a treatment plan/OCF-18 ("plan") dated March 1, 2022?

iv. 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?

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

RESULT

[3] The applicant injuries are predominantly minor as defined in s.3 of the *Schedule*.

[4] The applicant is not entitled to a non-earner benefit of $185.00 per week, the treatment plan for physiotherapy services, interest, or an award.

PROCEDURAL ISSUES

The applicant's request to exclude Dr. Milad's evidence is denied

[5] The applicant argued that the respondent has failed to provide the full accident benefits file as ordered by Adjudicator Ahmad in the Case Conference Report and Order ("CCRO") released on March 3, 2023. The applicant argues that the respondent's reliance on the records of Dr. Milad, which were not provided in the accident benefits file provided to the applicant, is prejudicial to the applicant.

[6] I find no prejudice towards the applicant. Dr. Milad is the applicants GP and the applicant relies significantly on Dr. Milad's records. Therefore, since the applicant had access to these medical records, I find that there is no prejudice to the applicant in the respondent relying on them as well. The applicant also argues that the respondent should not be able to rely on the surveillance contained in their submissions as surveillance is "not authorized by O Reg 34/10 S.A.B.S." The applicant has provided no reasoning behind this assertion and therefore the surveillance submitted will be admitted.

The respondent's request for an adverse inference to be drawn is denied

[7] The respondent has asked that an adverse inference be drawn as the applicant has failed to provide documents ordered in the CCRO including the OHIP summary, a prescription summary, a copy of the extended health care benefits, full particulars of the medical benefits, and income tax returns.

[8] While I accept the respondent's position, an adverse inference regarding the failure to produce medical documents is not necessary, as it is the applicant's burden to prove entitlement and the application has been dismissed. In relation to the failure to produce the necessary income tax returns, the failure to do so will be given appropriate weight regarding the denial of the NEB.

ANALYSIS

Applicability of the Minor Injury Guideline (MIG)

[9] The applicant's injuries are predominantly minor as defined under Section 3(1) of the *Schedule*.

[10] Section 18(1) of the Schedule provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured 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."

[11] An insured 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. In all cases, the burden of proof lies with the applicant.

a) Chronic pain

[12] The applicant relies primarily on reports from Dr. Nilav Bhowmik, Dr. Benjamin Milad and Dr. Mahsa Takallou whereas the respondent relies on reports from Sarah Maddix (OT), Dr. Khan as well as records from Dr. Milad.

[13] The applicant opines that they should be removed from the MIG because of chronic pain. However, the applicant has not been able to prove that they have a chronic pain condition.

[14] The respondent argues that a mention of chronic pain is not enough to be removed from the MIG. The respondent argues that the applicant does not meet the criteria for chronic pain set out in the AMA Guides 6th edition. The respondent argues that the applicant did not prove that they have 3 out of 6 conditions necessary to be diagnosed with chronic pain.

[15] The respondent is correct that the applicant has not been able to prove that they have met the criteria for chronic pain, as set out in the AMA Guides 6th edition. The applicant has not shown that they have a severe or debilitating condition and while the applicant did report feeling some pain to Dr. Milad, no proper diagnosis of chronic pain has been made.

b) Pre-existing condition

[16] The applicant argues they should be removed from the MIG due to a pre-existing condition that precludes recovery if kept within the MIG.

[17] However, the applicant has failed to meet their onus that there is a pre-existing injury or condition that is well documented and warrants removal from the MIG.

[18] The respondent argues that the applicant has not provided any evidence in the medical records to suggest that there has been aggravation to any pre-existing conditions as a result of the accident. The respondent also points to the fact that the applicant denied any pre-existing conditions to the respondent's section 44 assessors. The respondent also relies on Dr. Khan's assertion that the applicant did not have a documented pre-existing medical condition that could warrant removal from the MIG.

[19] The respondent is correct that the applicant has not provided evidence which shows that pre-existing medical conditions have been aggravated by the accident. Under section 18.2 of the SABS, the applicant must show "compelling medical evidence that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal medical recovery from the minor injury if the insured person is subject to the limit." Having a pre-existing condition itself does not warrant removal from the MIG as the applicant bears the onus of proving that the pre-existing condition prevents them from achieving maximum recovery under the MIG limits.

c) Section 38(8)

[20] Lastly, the applicant has argued that the applicant should be removed from the MIG due to a violation of section 38(8) of the *Schedule* as the insurer failed to provide medical reason(s) nor other reasons why the insurer considers any goods, services, assessments and examinations, or the proposed costs of them, not to be reasonable and necessary for denial.

[21] I disagree with the applicant and find that the notice given to the applicant is sufficient. The respondent clearly outlined their obligation to the insured, outlined what a minor injury is and explained that the applicant's injuries are predominantly minor as outlined in the SABS.

[22] I agree with the respondent and prefer their evidence. The applicant has not met the criteria to be removed from the MIG based on a pre-existing medical condition or through a diagnosis of chronic pain. I also reject the applicant's assertion that the respondent violated section 38(8) of the SABS.

[23] The applicant's injuries are minor in nature and shall remain in the minor injury guideline.

The applicant is not entitled to receive NEB

[24] The applicant is not entitled to receive NEB as they did not prove based on a balance of probabilities that they sustained a complete inability to carry on a normal life as a result of the accident.

[25] Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the accident if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. Section 3(7)(a) defines a "complete inability to carry on a normal life" as "an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident." The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mut. Ins. Co., 2009 ONCA 391*, which, generally, focuses on a comparison of the applicant's pre- and post-accident activities.

[26] Both the applicant and respondent rely on reports previously discussed.

[27] The applicant relies primarily on the CNRs from Dr. Milad and the OCF-3 filed by Dr. Bhowmik from January 17, 2022 where the doctor opines that the applicant has suffered injuries that should qualify them for the NEB. The applicant contends that the reports filed by Dr. Milad showing the applicant complained of insomnia, back pain, neck and shoulder pain as well as feeling anxiety should be enough to meet the test for NEB. The applicant also argues that the respondent violated section 36*(4)* and failed to respond to the applicant within 10 days. The applicant argues that the Dr. Bhowmik report and the failure of the respondent to act in accordance with the SABS should warrant the applicant's entitlement to NEB.

[28] The respondent argues that the applicant has failed to meet the test under *Heath.* The respondent also points to the report of Occupational Therapist Sarah Maddix where she concluded that due to a lack of objective information, she could not make a valid profile of the applicant's functional abilities to assist with addressing the test for NEB. Dr. Khan also found that he could not make a determination as to whether or not the applicant met the test for NEB. The respondent also points to the surveillance taken of the applicant where she is seen interacting with her children, neighbours, shopping, and going about daily activities without any struggle. The respondent argues that this shows that the applicant does not meet the test for NEB entitlement found in *Heath*.

[29] I agree with the respondent and prefer their evidence and reports. The applicant has not shown that they meet the test in *Heath* and has not met their burden of proof that the applicant has a complete inability to carry on a normal life. The report filed by Occupational Therapist Maddix shows that the applicant did not have a complete inability to perform her pre-accident activities of daily living. Additionally, the surveillance of the applicant shows her being able to conduct activities of daily living, similar to what she would have done before the motor vehicle accident. Additionally, neither of the section 44 assessors have been able to make any determination regarding whether the applicant meets the test for NEB. Lastly, as mentioned earlier, the applicant has not yet submitted the tax returns required by the respondent to determine whether the applicant is eligible for the specified benefit.

[30] The applicant's application for the NEB is dismissed.

The applicant is not entitled to physiotherapy services

[31] As the applicant's injuries have been deemed to be minor in nature and the MIG limits have been exhausted, the applicant is not entitled to this treatment plan.

Interest

[32] As this application has been dismissed in its entirety the applicant is not entitled to any interest.

Award

[33] 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. Provide the basis for the award. As the application is being dismissed in its entirety the applicant is not eligible for an award.

ORDER

[34] I find that:

i. The applicant's injuries are predominantly minor as defined under s. 3(1) of the *Schedule*;

ii. The applicant is not entitled to a NEB;

iii. The applicant is not entitled to physiotherapy services;

iv. No interest is due on overdue payments;

v. No award under s. 10 of Reg 664 is granted; and

vi. The application is dismissed.

Released: December 23, 2024

Gareth Neilson
Adjudicator