LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Tribunal File Number: 18-002368/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:

K.C.

Applicant

and

Pafco Insurance Company

Respondent

DECISION

PANEL:	**Stephanie Kepman, Adjudicator**
APPEARANCES:	
For the Applicant:	Svetlana Vinokur
For the Respondent:	Andrew McKague
HEARD:	**In Person on October 9, 2018**

OVERVIEW

[1] K.C. ("the applicant") was injured in an automobile accident ("the accident") on September 26, 2017 and sought insurance benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(the "Schedule").* He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") when his claims for benefits were denied by the respondent.

[2] The matter proceeded to a case conference on July 26, 2018, but the parties were unable to resolve the issues in dispute.

[3] The applicant is applying for Income Replacement Benefits (IRBs), with the monthly amount in dispute. The applicant was 33-years old at the time of the accident. He testified that he was employed as a brick layer/labourer at the time of the accident. He further testified that his ongoing pain, as a result of the accident, is preventing him from returning to his gainful employment. He argues that, as result of his medical condition, he quit his job on or about August 26, 2017, one month before his accident. He argues that the *Schedule* defines him as "employed" at the time of his accident since he was in receipt of Employment Insurance (EI) benefits.

[4] He is also applying to be removed from the Minor Injury Guideline (MIG) in order for three treatment plans to be considered reasonable and necessary. He argues that he should be removed from the MIG on the basis of having a pre-existing condition, mainly kidney stones. He also argues that he should be removed on the basis of having a psychological injury.

[5] The respondent disputes this, stating that the applicant was not employed at the time of the accident. The respondent argues that, prior to the applicant's accident, he had quit his job as a labourer because he has been having issues with the essential tasks of his job as a result of his previously existing medical condition. It argues that the applicant did not qualify as "employed" under the *Schedule* based on the applicant having made false representations to Service Canada in terms of his EI claim.

[6] The respondent also argues that the injuries the applicant sustained from his accident were minor in nature and should be qualified as such.

ISSUES

[7] The following issues are in dispute:

[1] O. Reg. 34/10.

(i) Is the applicant entitled to receive an income replacement benefit for the period from October 2, 2017 to date and ongoing?

(ii) If the applicant is entitled to receive an income replacement benefit, what is the monthly amount of the benefit the applicant is entitled to?

(iii) Did the applicant sustain predominantly minor injuries as defined under the Schedule?

(iv) Is the applicant entitled to a medical and rehabilitation benefit in the amount of $2,730.22 for chiropractic, massage and acupuncture treatment recommended by [a treatment plan] submitted on November 21, 2017, and denied on November 30, 2017?

(v) Is the applicant entitled to a medical and rehabilitation benefit in the amount of $2,000.00 for a psychological assessment recommended by [a treatment plan] submitted on Feb 15, 2018, and denied on February 16, 2018?

(vi) Is the applicant entitled to a medical and rehabilitation benefit in the amount of $282.49 for a lumbar spine x-ray completed on October 13, 2017 by [a Health Centre], submitted on November 15, 2017, and denied on November 15, 2017?

(vii) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[8] Based on the totality of the evidence before me, I find the applicant is not entitled to an IRB. I find that the applicant's injuries are outside the MIG, but that he is not entitled to any of the treatment plans in question. The applicant is entitled to a psychological assessment and interest on said assessment if it has been incurred.

ANALYSIS

[9] The parties submitted evidence via written submission in advance of a one-day, in-person hearing. During the in-person hearing, the applicant provided oral testimony.

[10] I have considered all of the evidence led before and during the hearing, and summarized what I found relevant to my determination below.

Income Replacement Benefit: Pre-104 Income Replacement Benefits

[11] The applicant bears the burden of proving, on a balance of probabilities, that he is entitled to a pre-104 week income replacement benefit from October 2, 2017 to date and on-going.

[12] The test for entitlement to a pre-104 week income replacement benefit (IRB) is set out in section 5(1)(i) of the *Schedule*, which states that the insurer shall pay an income replacement benefit if an insured person sustains an impairment as a result of the accident and "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". This is referred to as the "substantial inability" test.

Does the applicant suffer a substantial inability to perform the essential tasks of that employment?

[13] Based on the submissions and evidence presented by the parties, I am able to conclude that the applicant's tasks of his employment include:

1. Carrying heavy objects, weighing over 20 kilograms (kgs);
2. Laying bricks;
3. Standing for several hours at a time; and
4. Working in the rain.

[14] I must now determine if the applicant suffers a substantial inability to perform the essential tasks of said employment.

[15] The applicant's representative argues that the applicant is entitled to an IRB because of his substantial inability to complete the essential tasks of his employment. She argues that prior to his accident, the applicant lived a pain-free life. Her client testified that prior to the accident, he had no back pain. He was able to complete the essential tasks of his employment without difficulty. He continued by stating that, as a result of the accident, he can no longer work due to the intense pain he is living with.

[16] The respondent argues that the applicant is not entitled to an IRB because he is not suffering from a substantial inability to perform the essential tasks of his pre-accident employment.

[17] It relies on a Functional Abilities Evaluation Insurer's Examination (IE) conducted on February 8, 2018. The job of brick layer/labourer was qualified as requiring a heavy strength demand, requiring him to handle loads of more than 20 kg.

[18] The assessor, Mr. A.S.A. Holland, Chiropractor, states that the applicant refused to perform or did not give a reasonable effort to many of the tests during the evaluation. Mr. Holland describes this as self-limiting behaviour.

[19] Mr. Holland did observe that the applicant had issues sitting for more than 15 minutes due to pain and that he may have been limiting himself during the examination due to pain and needed to alternate between sitting and standing. The applicant described his right foot as “burning” while standing.

[20] The applicant’s representative addressed this in her submissions to the Tribunal by stating that the applicant’s self-limitation is evidence of his substantial inability. He was unable to fully participate in the evaluation due to the intense pain that the applicant is living with on a constant basis. She also argues that this should not penalize the applicant when considering and weighing the evidence, but rather, it demonstrates that his pre-existing condition, which will be explored later, contributed to the applicant’s substantial inability.

[21] The respondent also relies on an Orthopaedic Examination IE conducted by Dr. Oleg Safir, Orthopaedic Surgeon, on January 30, 2018. This examination concluded that the applicant did not suffer from any musculoskeletal impairment. Though the applicant was still complaining of pain over four months after the accident, Dr. Safir concluded that this pain was as a result of soft-tissue injuries and the applicant did not suffer a substantial inability to perform the essential tasks of his employment.

[22] Based on the evidence presented, I am inclined to believe that the applicant is unable to perform the essential tasks of his employment. I rely on both the applicant’s in-person testimony, and the IEs conducted for the respondent.

Was the applicant employed at the time of the accident as defined by the *Schedule*?

[23] Section 5(1) of the *Schedule* states that an insurer shall pay an IRB to an insured who sustains an impairment if the person:

1. *“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, or*

2. *was not employed at the time of the accident but, was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the Employment Insurance Act (Canada) at the time of the accident”*

[24] The applicant stated that at the time of his accident, he was employed [by 2279117 Ontario Inc.] His representative provided paystubs to prove this.

[25] His representative submitted that the applicant had been working for [the company] for almost 10 years. The applicant described his job as seasonal, meaning he was only employed when the seasons allowed so, which was generally the spring season until the fall season. He stated that each year he would begin work for [the company] in approximately May and would be laid off towards the end of September due to work shortages. It would be at this point that the applicant would make a claim for EI, which he did on an annual basis.

[26] The respondent argues that the applicant was not employed at the time of his accident and had in fact quit his job. It relies on the Employer's Confirmation Form (OCF-2), completed by the owner of [2279117 Ontario Inc.] Part 4 of the OCF-2 form clearly states "*applicant stopped working for us August 26/17".*

[27] Further, during the in-person portion of the hearing, the respondent put before the applicant his Canada Revenue Agency (CRA) Record of Employment (ROE) from [2279117 Ontario Inc.] The applicant's ROE, dated September 30, 2017, states that the applicant's last day of pay from [2279117 Ontario Inc.] was August 25, 2017, and that the reason for issuing the ROE was that the applicant "quit".

[28] This was in direct contradiction to the applicant's ROEs from 2011-2016, where the applicant's ROE stated that the form was issued because "shortage of work/end of contract or season".

[29] The applicant was asked to address why he was denying that he quit, when the respondent had established his history of working for [the company] for the summer season, and then going on Employment Insurance during the winter months, and never having had quit in the past. The applicant stated that this was "just a misunderstanding" and that CRA had "fixed all of this" but was unable to provide any evidence of such.

[30] Further, the applicant was asked about his current issues with Service Canada. The respondent presented to the applicant correspondence from Service Canada regarding his EI claims from 2008, 2009, 2011, 2012, and 2014. The correspondence states that the applicant did not report his earning correctly to Service Canada. The correspondence stated that the applicant had been reporting hours and earnings in excess of what had actually been worked in order to qualify for EI benefits.

[31] Due to the frequency of these errors, Service Canada concluded that the applicant knowingly made false representations. Because the applicant had a

previous incident of improper reporting, Service Canada imposed a penalty and deemed the applicant not to qualify for EI since he did not work enough hours.

[32] The respondent argues that based on these frequent instances of misreporting, the applicant was not receiving benefits from EI. He did not qualify for EI due to his infrequent work hours.

[33] I put more weight on the respondent's evidence, based on the applicant's lack of credibility. He stated in his testimony that he had not dealt with back pain prior to his accident, but was presented with medical evidence that not only had he left his job due to back pain related to his kidney stones, but had ongoing credibility issues with CRA, who went as far as to state that the applicant knowingly made false representations regarding his income during the time of the accident.

[34] I find that the applicant is not entitled to an income replacement benefit and quantum does not need to be determined, as the applicant had quit his job at the time of his accident and did not qualify for EI benefits.

The Minor Injury Guideline

[35] Section 3(1) of the *Schedule* 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 and includes any clinically associated sequelae to such an injury." The MIG defines in detail what these terms for injuries mean.

[36] The onus is on the applicant to show that his injuries fall outside of the MIG[2]. In this case, the applicant is arguing to be removed from the MIG on the basis of having a pre-existing condition.

Does the applicant have any pre-existing conditions?

[37] Section 18(2) of the *Schedule* provides that insured persons with minor injuries who have a pre-existing medical condition may be exempted from the $3,500 cap on benefits. In order to be removed from the MIG, the applicant must provide compelling evidence meeting the following requirements:

i. There was a pre-existing medical condition that was documented by a health practitioner before the accident; and

ii. The pre-existing condition will prevent maximal recovery from the minor injury if the person is subject to the $3,500 on treatment costs under the MIG.[3]

[2] *Scarlett v. Belair,* 2015 ONSC 3635 para.24

[38] The standard for excluding an impairment on the basis of pre-existing conditions 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 cap imposed by the MIG.

[39] I find that the evidence establishes that the applicant should not be removed from the MIG due to his pre-existing health condition.

[40] The applicant argues that he should be removed from the MIG because of his pre-existing condition, specifically kidney stones, which are supported by the applicant's medical and OHIP records.

[41] The respondent submits that based on its IE assessments, the applicants injuries are soft tissues in nature and fall within the MIG. The respondent's assessors found that the applicant had reached maximum medical recovery and did not address how the applicant's recurring issues with kidney stones may affect or compound his soft tissue injuries.

[42] Instead, the respondent states that the applicant's back pain stems from mild degenerative disc disease, which is unrelated to the accident. This pain is well documented in the respondent IE examinations.

[43] I find that the applicant's physical injuries are minor in nature. He has not presented evidence demonstrating how his pre-existing condition, kidney stones, would prevent him from reaching maximum medical recovery within the MIG. He also not revealed how further physical manipulation would assist him in addressing his pain related to his accident. It is the applicant's onus to show this, and he has failed to do so.

Does the applicant have (a) psychological impairment(s)?

[44] The applicant claims that he sustained a psychological injury as a result of the accident that places his claims outside of the MIG.

[45] Psychological injuries, if established, may fall outside the MIG, because the MIG only governs "minor injuries" and the prescribed definition does not include psychological impairments.

[46] To support this claim, the applicant relies on two assessments conducted on the applicant. The first assessment was conducted at the request of the applicant, known as a section 25 Assessment. This assessment was conducted on July 6, 2018 by Ms. Mursal Srosh, Psychotherapist, under the supervision of Dr. Knolly Hill, Psychiatrist.

[3] Minor Injury Guideline, Superintendent's Guideline 01/14, issued pursuant to s. 268.3 (1.1) of the *Insurance Act* page 5, Part 4, "Impairments that do not come within this Guideline".

[47] The assessment diagnosed the applicant with Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia, Situation type (Driver-related). The assessment noted that the applicant also had features of Post-Traumatic Stress Disorder (PTSD), warranting ongoing monitoring and treatment.

[48] The assessment recommended psychotherapy, specifically 10 sessions of cognitive-behavioral therapy (CBT) for the applicant, to assist him deal with his coping skills.

[49] The applicant also relies on the IE of the respondent, specifically that of Dr. Saunders, Psychologist, conducted on February 13, 2018. Though the assessment found that the applicant did not suffer from a substantial inability from a psychological impairment as a result of the accident, Dr. Saunders did find the following: "*The claimant's Global Score on the CDS-R was 39. Scores in this range are generally indicative of extremely severe depressive experience."* Dr. Saunders continues: ""*The results of the MAQ (Multi-Dimensional Anxiety Questionnaire) showed elevations consistent with severe anxiety".*

[50] The respondent also relies on its IE. It takes issues once again with the applicant's validity testing. Specifically, it argues that Dr. Saunders noted that the applicant has a tendency to present himself in a negative and pathological manner, suggestive of a deliberate distortion of his presentation and a possibility of malingering.

[51] The respondent also argues that the applicant never made complaints about his psychological conditions to his general practitioner. Therefore, he does not have a psychological injury.

[52] I find the applicant does have a psychological injury that would take him out of the MIG. This is based on the finding of both Dr. Hill and Dr. Saunders. The IE of the respondent demonstrates that even the respondent's own evidence shows the applicant is dealing with psychological symptoms. This is supported by the applicant's testimony, and his section 25 assessment.

Medical and Rehabilitation Benefits

[53] Section 14 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary.

a. Chiropractic, Massage & Acupuncture Treatment

[54] The applicant, who has now been removed from the MIG, seeks medical benefits for chiropractic, massage and acupuncture treatment. He must prove that this expense is reasonable and necessary.

[55] This treatment plan was denied on November 30, 2017 and explained via Explanation of Benefits (EOB) letter to the applicant and his representative dated December 1, 2017. The EOB stated that an IE was being arranged to determine the applicability of the MIG.

[56] The applicant's representative argued in her written submissions that the MIG was not applicable since the respondent did not give a proper medical or other reasons for denial of the treatment plan within ten business days, as prescribed by the *Schedule*.

[57] Section 38(8) of the *Schedule* requires the insurer to notify the insured person within 10 business days whether or not it will pay for the goods and services claimed and if it does not agree to pay for the goods and services, the medical reason and all other reasons why said goods and services are not reasonable and necessary.

[58] Under section 38(11), if an insurer fails to comply with this requirement, it is prohibited from taking the position that the MIG applies and must pay for all goods, services, assessments and examinations of said treatment and assessment plan that related to the period, starting on the 11th business day after the insurer received the applicant, and ending on the day the insurer provides proper notice.

[59] Normally, I would review the evidence to make a determination. However, in this case, not only has the applicant been removed from the MIG, but, as noted by the applicant, the potentially faulty Explanation of Benefits (EOB) by the respondent was resolved on January 2, 2018 by a follow up EOB.

[60] Therefore, I must determine if the treatment plan is reasonable and necessary. The applicant's representative has provided clinical notes & records (CNRs) demonstrating that he is dealing with ongoing pain. However, I was unable to read any of these notes. She has also provided me with several articles regarding the benefits of passive therapy for lumbar radiculopathy & sciatica.

[61] The applicant has not provided any direct evidence regarding the reasonable or necessity of the applicant's treatment plan in relation to his injuries.

[62] The respondent was able to provide me with direct evidence regarding the reasonableness and necessity of this treatment plan, specifically from the IE it had conducted on the applicant by Dr. Safir. Dr. Safir found that the applicant had no objective musculoskeletal impairment caused by the accident.

[63] Instead, Dr. Safir found that the applicant had suffered from a soft-tissue injury, which should resolve itself within eight to twelve weeks. Dr. Safir noted that the applicant had been undergoing ongoing massage, chiropractic and acupuncture

treatment when the assessment was conducted. Based on his objective and subjective observations, the applicant had reached maximum medical recovery, since he had been dealing with back pain prior to his accident. Therefore, Dr. Safir opined that the applicant's request for more passive therapy was not reasonable or necessary.

[64] The applicant has been removed from the MIG on the basis of psychological injury. After reviewing the evidence, I do not find the chiropractic, massage and acupuncture treatment plan reasonable and necessary. I find the applicant has failed to present evidence linking his injuries and impairments to the treatment he is seeking. Being removed from the MIG does not entitle an applicant to all treatment plans requested. The applicant must demonstrate how the treatment plan he is requesting is reasonable and necessary based on his injuries.

b. Lumbar Spine X-Ray

[65] The applicant seeks a medical benefit for a lumbar spine x-ray, completed on October 13, 2017. The applicant argues that this x-ray was executed on the basis of s. 38(2)(b) of the *Schedule.*

[66] This section states that an insurer is not liable to pay for a medical or rehabilitation benefit, assessment or examination that was incurred before the insured submits an OCF-18 unless the expense is for an ambulance or other good or service provided on an emergency basis not more than five business days after the accident. As noted, s. 38(8) specifies business days, which under s.3(1) are defined to exclude weekends and most statutory holidays.

[67] The applicant argues this expense is payable, since it was done by the chiropractor on a "due diligence" basis. However, the respondent argues that that this service was in contravention of section 38(2)(b), as it was performed sixteen days after the accident, and therefore, is not payable.

[68] After reviewing the arguments and evidence, I find that the applicant and the respondent erred in counting *business* days, which begin from the day of the accident, Tuesday, September 26, 2017, and ended Friday, October 13, 2017. Monday, October 9, 2017 was not counted, as it was Thanksgiving.

[69] This resulted in 13 days being counted between the two dates in question, outside of the limits of section 38(8) of the *Schedule.*

[70] Therefore, the applicant did not respect section 38(2)(b), and is not entitled to the costs for the x-ray.

Cost of Examination – Psychological Assessment

[71] I must determine if the applicant is entitled to the disputed psychological assessment. To do so, I must determine if the plan is reasonable and necessary, pursuant to section 25(1)(3) of the *Schedule*.

[72] The applicant has the onus of showing on a balance of probabilities that the medical expenses and/or examinations are reasonable and necessary as a result of injuries caused by the accident.

[73] The applicant has requested funding from the insurer for a psychological assessment in the amount of $2,000.00, recommended by Toronto Central Diagnostics, in a Treatment and Assessment Plan (OCF-18), submitted on February 16, 2018.

[74] The respondent denied the assessment based on the applicant's injuries falling within the MIG and deeming the treatment not reasonable and necessary. This finding was made based on the respondent's own IE assessments, specifically that of Dr. Douglas Saunders.

[75] Based on the fact that the applicant has been removed from the MIG on the basis of having a psychological impairment, I must now determine if this psychological assessment is reasonable and necessary.

[76] Since this examination and that of Dr. Saunders led to the applicant being removed from the MIG, I find it to be reasonable and necessary. It has provided the parties with diagnoses of the applicant's conditions.

CONCLUSION

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

i. The applicant is not entitled to an income replacement benefit.

ii. The applicant did not sustain a minor injury.

iii. The applicant is not entitled to costs for chiropractic, massage and acupuncture.

The applicant is entitled to costs for a psychological examination

iv. The applicant is not entitled to costs for the x-ray.

v. The applicant is entitled to interest relating to the psychological examination.

Released: February 25, 2019

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Stephanie Kepman
Adjudicator