LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

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

Tribunal File Number: 18-000026/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:

A.P.

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

PANEL: **Jesse A. Boyce, Adjudicator**

APPEARANCES:

For the Applicant: Piera A. Segreto

For the Respondent: Maia Abbas

HEARD: **In Writing on: October 1, 2019**

OVERVIEW

[1] The applicant, A.P., was injured in an automobile accident on February 7, 2018 and sought benefits from the respondent, Economical Mutual Insurance Company, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the *"Schedule"*).

[2] A.P. applied for medical and rehabilitation benefits as well as an income replacement benefit ("IRB") that were denied by Economical because it determined that A.P.'s injuries were predominately minor and therefore subject to treatment within the Minor Injury Guideline ("MIG"). A.P. disagreed and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service for resolution of the dispute. The parties participated in a case conference but were unable to resolve the issues in dispute and, thus, proceeded to this written hearing.

ISSUES TO BE DECIDED

[3] The following are the issues to be decided as set out in the Case Conference Order dated May 10, 2019:

i. Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?

ii. Is the applicant entitled to an income replacement benefit in the amount of $400 weekly from February 2, 2014 to date and ongoing?

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

iv. Is the applicant entitled to an award under *Ontario Regulation 664* on the basis that the respondent unreasonably withheld or delayed the payment of benefits?

[4] Several other issues were identified in the Case Conference Order, however, in submissions, the parties were able to resolve them, and the issues listed above comprise the focus of this written hearing.

RESULT

[5] I find A.P. sustained predominately minor physical injuries from the accident which are treatable within the MIG. However, I find he has demonstrated, on a

[1] O. Reg. 34/10.

balance of probabilities, that he suffers from pre-existing chronic pain that prevents maximal medical recovery if he is subject to the confines of the MIG. Accordingly, he is removed from the MIG.

[6] On the information before the Tribunal, I find A.P. has not provided sufficient documentation to calculate his IRB as a self-employed person under the *Schedule*.

ANALYSIS

Applicability of the Minor Injury Guideline

[7] I find the medical evidence indicates that A.P. suffered predominately minor physical injuries as a result of the accident.

[8] The MIG establishes a framework for the treatment of minor injuries, as defined in s. 3(1) of the *Schedule*. Section 18(1) limits recovery for medical and rehabilitation benefits for predominantly minor injuries to $3,500. Applying *Scarlett v. Belair Insurance*,[2] the applicant must establish entitlement to coverage beyond the $3,500 cap on a balance of probabilities.

[9] The OCF-3 in evidence, dated February 14, 2018 and prepared by A.P.'s family physician, indicates A.P.'s injuries as lumbar strain/pain, whiplash and cervicogenic headaches.

[10] The physical injuries documented in the weeks and months after the accident fall within the definition of minor injury, as they are listed as neck and back pain, headaches, whiplash and sprain and strain-type injuries. I find that these injuries, considered alone, fall squarely within the definition of "minor injuries" under s. 3(1) of the *Schedule* warranting treatment within the MIG.

[11] However, the basis for A.P.'s application and the parties' dispute is his belief that because of the accident he sustained psychological impairments and these impairments, coupled with his pre-existing issues with chronic back pain and sciatica, remove him from the MIG limits.

Psychological Impairments and Pre-Existing Chronic Pain

[12] Under s. 18(2) of the *Schedule*, A.P. can escape the confines of the MIG if he provides compelling medical evidence documented by a health practitioner before the accident indicating that he has pre-existing injuries or psychological

[2] 2015 ONSC 3635.

impairments that will prevent him from achieving maximal medical recovery if he remains within the MIG.

[13] While I am not prepared to accept the evidence of his psychological impairment preventing recovery, I find that A.P. has shown, on a balance of probabilities, that he had been suffering from chronic back pain in the years pre-accident that was then exacerbated by the accident and now requires access to treatment beyond the limits of the MIG in order to help achieve his maximal medical recovery.

[14] A.P. relies on clinical notes and records dating back to 2011 and an MRI from 2015 as evidence that he suffers from pre-existing physical impairments that prevent him from achieving maximal medical recovery under the MIG. As evidence of his psychological impairments, he relies on the OCF-18 of Dr. Bodenstein, who provisionally diagnosed A.P. with adjustment disorder and other sleep disorders and recommended a psychological assessment.

[15] In response, Economical submits that A.P. has not provided compelling evidence from a medical professional that his condition precludes recovery if he is subject to the MIG, that he only attended at his physician twice in the two years pre-accident to complain of back pain and that he had recovered from his sciatica. I disagree.

[16] I agree with A.P. that his back pain has been continuously and consistently documented in the clinical notes and records on file, notably in the period between 2015 and 2017 pre-accident, where he visited his family physician to complain of back pain on numerous occasions. I find that this timeline is further supported by the MRI from 2015 which found “persisting encroachment of the left S1 nerve root” and his doctor’s ultimate diagnosis of chronic back pain. By all accounts, I find it is the left side sciatica/chronic back pain that has hindered A.P. since a previous 2011 accident.

[17] On review of his family doctor’s notes, I find A.P. has attempted various treatments and pain relief medication—including Percocet—over the years to cope with the pain, but that the same source of pain continues to bother him. I accept that this pain, like most injuries, can fluctuate over time and limit A.P.’s function when it is at its worst. I agree with A.P. that the fact he only complained of back pain to his family doctor twice in the two years pre-accident is an indication that his pain was being managed but was then exacerbated by the accident. A.P.’s consistent and escalating complaints of back pain post-accident provide support for this and, in my view, undermine Economical’s argument that his pain had resolved. On this basis, I find it is reasonable to remove A.P. from

the MIG so that he may seek additional treatment in the hope that he may achieve his maximal medical recovery.

[18] For completion, I agree with Economical and do not find that there is compelling evidence at this time that A.P. should be removed from the MIG on the basis of his psychological impairments. I find Dr. Bodenstein only made a provisional diagnosis of A.P. having adjustment disorder and other sleep disorders. Unlike A.P.'s persistent complaints of back pain over the years, there are no complaints of psychological issues in the treating notes or records before the Tribunal. While I make no determination on his psychological impairments, I find A.P. has not met his burden to establish his removal from the MIG because of psychological impairments on the evidence provided.

[19] In any event, I find that A.P. has demonstrated, on a balance of probabilities, that he suffers from chronic back pain, a pre-existing impairment documented by a health practitioner, that prevents him from achieving maximal medical recovery if he is subject to the confines of the MIG. Accordingly, I find that A.P. should be removed from the MIG.

Income Replacement Benefit

[20] A.P. worked as a hairstylist pre-accident, logging 40 hours and earning $599.46 per week. He submits he continued to work post-accident on a modified basis, working approximately 20 hours and earning $299.73 per week, while taking frequent breaks to rest his back on the advice of his doctor. His job duties are typical of those of a hairstylist: washing, cutting, styling, standing for long periods, *etc*. The parties agree on these facts and that he meets the test for IRB under s. 5 of the *Schedule*.

[21] In submissions, however, the parties do not focus on entitlement but rather on quantum and how the amount of IRB should be calculated. A.P. argues that he is an employee of the salon and rents a chair at R&T Beauty Bar, while also owning shares of Salon G&A, Inc. On the contrary, Economical argues that he is more than an employee of Salon G&A, but rather a self-employed "controlling mind" of the business. This distinction is important because A.P.'s pre-accident work capacity and designation informs the calculation of his IRB benefits. The reports relied on by the parties reflect this disagreement.

[22] A.P.'s entitlement to an IRB falls under s. 5(1)(1)(i) of the *Schedule*. However, since entitlement is not in dispute, the relevant inquiry turns to s. 7 of the *Schedule* because income from self-employment is treated differently than income from employment. Generally, a self-employed person's benefit rate is

based on their income, net of expenses, either in the 52-week period prior to the accident or in the last complete fiscal year of the business. An insured is only compensated under s. 7(2)2 if they have incurred losses as a result of an accident. Section 3(1) provides the definition for self-employed person as: a person who (a) engages in a trade, occupation, profession or other type of business as a sole proprietor or as a partner, other than a limited partner, of a partnership, or, (b) is a "controlling mind" of a business carried on through one or more private corporations some or all of whose shares are owned by the person.

[23] Against this definition, A.P. submits that he is not a "controlling mind" of Salon G&A but rather an employee who works a set number of hours for a fixed weekly salary. He relies on the report of McCully & Associates that examined his income tax returns and payroll summaries to determine that A.P. is an employed person entitled to IRB in the amount of $400 per week, less post-accident income, for a total weekly IRB of $190.19. He argues that Economical's report fails to provide any evidence beyond share ownership and speculation that he is a "controlling mind" of the business.

[24] In response, Economical relies on the report of Davis Martindale as evidence that A.P. is self-employed. The report found that there was not enough information to calculate A.P.'s IRB entitlement. Specifically, the report notes that the corporate income tax returns, documentation of the salon's monthly revenues, labour costs, average costs and A.P.'s pre and post-accident duties are all required to properly calculate his IRB quantum, which is the method endorsed by the Divisional Court in *Surani v. Perth Insurance.*[3] Further, Economical submits the following facts in support of its argument that A.P. is self-employed: A.P. indicated that he was self-employed in his original application for benefits; he is a shareholder of Salon G&A; A.P. does not pay employment insurance because he is, presumably, subject to the exception for self-employed individuals with over 40% ownership of the voting shares; his annual salary between 2015 and 2017 was consistent ($24,000, $25,000, $25,000) and did not fluctuate; and generally, that the financial documents provided do not accurately reflect his income situation or the business relationship.

[25] I find the language from the Financial Services Commission of Ontario case *Carr and Lombard* (FSCO A00-0041, September 11, 2011) submitted by Economical to be helpful in identifying the indicators of traditional self-employment situations. For example: where the individual is an owner of an

[3] 2018 ONSC 7254, at para. 20.

unincorporated sole proprietorship or a partner in a partnership, and makes executive decisions about the business; has an established location where business transactions take place; participates in everyday business operations (as opposed to being just an investor, for example); controls his own methods, schedule and hours or work, and may not necessarily work a set number of hours per set period; and determines the annual income as his or her profit from the business for Canadian income tax purposes*, etc*.

[26] I find all of these indicators of self-employment apply to A.P.'s situation and on this basis, I agree with Economical that the inquiry into the amount of A.P.'s pre and post-accident income is not precluded simply by his insistence that he is an employee. On the facts and evidence before the Tribunal, I find it clear that A.P. operates as a self-employed person, as defined by the *Schedule*. While I do not find his response on the application or the signature on the OCF-2 to be determinative, I cannot overlook the following facts: that A.P. is a shareholder of Salon G&A; that he reported a consistent salary that did not fluctuate over three years; that he did not pay employment insurance during this period; and that he is able to control his hours of work. I find all of these facts to be compelling indications that A.P. is self-employed and, indeed, a "controlling mind" of Salon G&A, which is a "business carried on through one or more private corporations some or all of whose shares are owned by the person." I find A.P. is able to make executive decisions on the business, like renting a chair at R&T Beauty Bar or controlling his hours of work, which, in my view, makes him both a shareholder and controlling mind and, therefore, considered self-employed for the purposes of calculating an IRB.

[27] Contrary to A.P.'s submissions, I find that he has not provided compelling documentation—other than his contention that he is an employee and the report that echoes this—to overcome the evidence and Economical's position that he is self-employed. As it is A.P.'s onus, I find he has fallen short in providing the documentation required to calculate his IRB under the *Schedule* as a self-employed person.

Award

[28] A.P. claims entitlement to an award under s. 10 of *Ontario Regulation 664* on the basis that Economical unreasonably withheld the payment of his IRB based on its position that he is self-employed without sufficient evidence. A.P. argues this has caused him undue stress and financial hardship. Under s. 10, the Tribunal may issue an award of up to 50 per cent of the amount to which A.P. is

entitled if the Tribunal finds that Economical has unreasonably withheld or delayed payments because of its conduct.

[29] On the facts and evidence before me, I find an award is not appropriate. Economical was within its rights under the *Schedule* to challenge A.P.'s employment designation and quantum calculation, a decision I find reasonable for the reasons outlined above. While A.P. disagrees, I find there was nothing improper about Economical's handling of the issue and, in my view, nothing amounting to unreasonable conduct or bad faith sufficient to warrant an award.

CONCLUSION

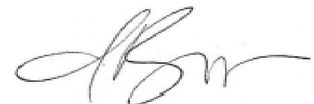
[30] For the reasons outlined above, I find that:

i. A.P. has demonstrated, on a balance of probabilities, that he suffers from pre-existing chronic pain that prevents maximal medical recovery if he is subject to the confines of the MIG. Accordingly, he is removed from the MIG.

ii. A.P. is a self-employed person as defined by the *Schedule* but has not provided sufficient documentation to calculate his IRB as a self-employed person.

iii. A.P. is not entitled to an award under s. 10 of *Ontario Regulation 664.*

Released: October 8, 2019



Jesse A. Boyce
Adjudicator