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

Citation: Soumya Padhy vs. Aviva General Insurance Company, 2020 ONLAT 18-008876/AABS

Released Date: 05/08/2020
File Number: 18-008876/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:

Soumya Padhy

Applicant

and

Aviva General Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Maureen Helt**

APPEARANCES:

For the Applicant:	Soumya Padhy, Applicant Cecil R Jaipaul, Counsel
For the Respondent:	Sonya Katrycz, Counsel

HEARD: In-Person: **June 11, 2019**

REASONS FOR DECISION

OVERVIEW

[1] The applicant was involved in an automobile accident on September 18, 2016, and sought benefits pursuant to the Statutory Accident Benefits Schedule -Effective September 1, 2010 (the "Schedule"). The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[2] At the time of the accident, the applicant was working full-time as an administrative assistant for an import and export company. The nature of her work was largely administrative involving accounting, packaging, etc. The applicant returned to work immediately after the accident for a period of five weeks. On October 25, 2016, the applicant stopped working, only to return to work on July 27, 2017. In the intervening time period, she received employment insurance

ISSUES

[3] The issues in dispute were identified and agreed to as follows:

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 $400.00 weekly from October 26, 2016 to July 22, 2017 submitted on October 25, 2016 and denied on February 27, 2017?

[4] If the applicant's injuries are not considered minor as defined under the Schedule, the Tribunal must determine the following:

iii. Is the applicant entitled to a medical benefit for chiropractic services in the amount of $4,286.78 recommended by Universal Health & Rehabilitation in a treatment plan (OCF-18) submitted on February 20, 2017 and denied on February 27, 2017?

iv. Is the applicant entitled to a medical benefit for chiropractic services in the amount of $3,245.87 recommended by 360 Rehabilitation in an OCF-18 submitted on August 2, 2017 and denied on September 8, 2017?

v. Is the applicant entitled to a medical benefit for chiropractic services in the amount of $3,697.05 recommended by 360 Rehabilitation in an OCF-18 submitted on November 19, 2017 and denied on December 1, 2017?

vi. Is the applicant entitled to a medical benefit for chiropractic services in the amount of $4,373.69 recommended by 360 Rehabilitation in an OCF-18 submitted on April 20, 2018 and denied on May 4, 2018?

vii. Is the applicant entitled to the cost of prescription drugs in the amount of $31.39 submitted in an OCF-6 on April 20, 2018 and denied on August 27, 2018?

viii. Is the applicant entitled to the cost of a performance demand analysis in the amount of $285.00 ($1,240.91 less $955.91 approved) recommended by 360 Rehabilitation in an OCF-18 submitted on November 18, 2016 and partially approved on November 30, 2016?

ix. Is the applicant entitled to the cost of a functional abilities' evaluation in the amount of $1,892.15 recommended by 360 Rehabilitation in an OCF-18 submitted on August 11, 2017 and denied on September 8, 2017?

x. Is the applicant entitled to the cost of a chronic pain assessment recommended by 360 Rehabilitation in an OCF-18 submitted on December 27, 2017 and denied on January 10, 2018?

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

xii. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

RESULT

[5] I find that the applicant sustained predominantly minor injuries as defined under the Schedule. It is therefore unnecessary to consider the reasonableness or necessity of the treatment plans. I also find that the applicant is not entitled to an income replacement benefit. There will be no order as to an award.

ANALYSIS

[6] A one-day in-person hearing was conducted. The Applicant testified as to her physical and psychological injuries arising from the accident and the services and treatments required. An accident benefits adjuster of Aviva testified on the adjusting of the claims and procedures used. No other witnesses were called on behalf of either party. I have reviewed all the testimony, submissions and evidence led during the hearing and I have only summarized what I found relevant to my determination below.

Preliminary Issue

Are the Treatment Plans and Expenses Payable on the basis of Non-Compliance with s. 38(8)?

[7] Throughout the hearing the applicant focussed most of the argument on a claim that the insurer breached s. 38(8) of the Schedule. Section 38(8) imposes multiple procedural requirements on an insurer after receiving a treatment or assessment plan – it must respond within 10 business days, state what benefits it will or will not pay for, and, if it refuses to pay for any benefit, provide the medical or other reasons why the treatment not to be reasonable or necessary.

[8] The Schedule is clear, if an insurer fails its obligation under subsection 38(8), it triggers the consequences in subsection 38 (11) which states that if the insurer fails to give a notice in accordance with subsection (8) in connection with a treatment and assessment plan, the following rules apply:

a) The insurer is prohibited from taking the position that the insured person has an impairment to which the Minor Injury Guideline applies.

b) The insurer shall pay for all the goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives a notice described in subsection (8).

[9] The applicant submits that while the treatment plans were properly submitted, the denials were insufficient. The applicant further submits that the insurer's Notice of Examinations ("Notices") failed to identify the applicability of the Minor Injury Guideline ("MIG") as a reason for the examination. Rather, the Notices set out the purpose of the examinations as being for IRB purposes, not for medical or rehabilitation benefits.

[10] The respondent submits that the applicant was made fully aware of the purpose of the examination being to address the MIG, the treatment plans and the applicability of IRB. Further the respondent stated it properly notified the applicant of the denial of all of the benefits claimed both in terms of providing reasons for the denial and doing so in a timely manner.

[11] For each of the treatment plans I have reviewed the chronology of denials and explanation of benefits (EOB) provided by the respondent and find that the denials contain all the required information outlined in section 38(8). I set out a brief summary of the explanation of benefits.

i. The EOB dated November 30, 2016 clearly references the cap of $3,500 in benefits payable in respect of an impairment that is primarily minor in nature.

ii. The respondent sent a letter to the applicant in December 2016, advising the applicant that it required further information in order to consider the request for benefits.

iii. Then again in January 2017 the applicant was advised by the insurer that that until it is in receipt of certain additional information, no benefits would be considered payable.

iv. Again, in response to another treatment plan the insurer sent an EOB dated February 28, 2017 to the applicant. Two treatment plans were denied on the basis that certain information was outstanding and it was explained that no benefits would be payable until the information was provided. The applicant was advised that Dr. Benfayed “has concluded that the injuries you sustained in the motor vehicle accident are predominately minor in nature.”

v. The insurer also addressed the income replacement benefit referencing the insurer’s February 3, 2017 letter which requested information by February 27, 2017. As a result of the information not being provided, the applicant was put on notice that she is no longer eligible for an IRB as of February 28, 2017.

vi. The September 9, 2017 EOB clearly sets out the insurer’s decision not to fund any of the proposed treatment plans and references the insurer’s examination addendum report of Dr. Benfayed wherein he concludes that the injuries sustained in the motor vehicle were predominantly minor in nature.

[12] After reviewing the evidence, I find the reasons for the denial that were provided were sufficient. The various EOBs reviewed above clearly demonstrate that the insurer set out the reasons for the denial of the requests for the various treatment plans and assessments and the IRB.

[13] The insurer clearly articulated that not only could they not consider the payment of benefits until additional information provided but also, based on an insurer examination, there was no evidence that the injuries sustained were not predominantly minor. I also find that while the Notices failed to check off the

applicability of the MIG as a reason for the Notice, it is clear that the applicability of the MIG was an issue as set out in the EOB of November 30, 2016 which clearly references the cap of $3,500 in benefits payable in respect of an impairment that is primarily minor in nature.

[14] I therefore find that the denial letters are not deficient and the consequences under s. 38(11) do not follow. The question now remains: did the applicant suffer predominantly minor injuries?

Did the Applicant sustain predominantly minor injuries as defined under the Schedule?

[15] The Minor Injury Guideline ("MIG") establishes a framework for the treatment of minor injuries. The term "minor injury" is defined in section 3 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 also defined in section 3. Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to $3,500 minus any amounts paid in respect of an insured person under the MIG.

[16] To access the increased benefits, the onus is on the applicant to prove on a balance of probabilities that their injuries are not minor or that they have a pre-existing medical condition, documented prior to the accident, which will prevent them from achieving maximal recovery if benefits are limited to the MIG cap of $3500.00.

[17] To support her claim that her injuries are not minor, the applicant relies on the two disability certificates which were prepared and submitted and the treatment plans in dispute. In the disability certificate dated November 1, 2016, the applicant's injuries are described as WAD 3, L-SP/SI SD, Sciatica and cranial nerve injury. In the disability certificate dated July 27, 2017, her injuries are described as the same but with the addition of headaches, driving anxiety and sleep disorder.

[18] The treatment plans in dispute set out her injuries as whiplash associated disorder, cranial nerve injury, phobia anxiety disorders, sleep disorders and other chronic pain. In terms of goals, each of the treatment plans states pain reduction, increase in strength and increased range of motion. The functional goals were described as returning to activities of normal living, return to pre-accident work activities and return to modified work.

[19] The applicant testified that between the date of the accident and when she stopped working in October 2016, she was attending chiropractic treatment and she

continued to attend treatment after she stopped working. She stated that the treatment helped her.

[20] The respondent submits that the applicant suffered soft tissue injuries and nothing more. This position is based on both the nature of the accident and the fact that the applicant's own family doctor simply referred to her minor injuries and referred her to physiotherapy. The respondent also relies on the reports prepared as a result of the insurer examinations of the applicant which confirm a diagnosis of soft tissue injury.

[21] The respondent also entered into evidence a surveillance report prepared in relation the applicant's activities one morning in February 2017. On that date, at 7:30 am, the applicant was seen to be using a long-handled snow brush to brush snow from her vehicle. Then after dropping her children off at school, she went to No Frills and was observed to be putting groceries into the trunk of her car and when she arrived home, she was able to bring the groceries inside her home.

[22] Dr. Benfayed, an orthopaedic surgeon, conducted an insurer examination of the applicant on February 17, 2017. In his report dated February 24, 2017, Dr. Benfayed, at page 5, stated that:

> At the time of the assessment, Ms. Padhy complained of pains in her neck, right shoulder, upper-mid back and headaches.
>
> Based on the history, physical examination, and review of documentations, Ms. Padhy's accident-related diagnosis is consistent with cervical sprain/strain, thoraco-lumbar sprain/strain and soft tissue injury to right shoulder.
>
> The headaches were not addressed as it falls outside the scope of my expertise. On today's examination, Ms. Padhy had functional range of motion of her cervical spine, shoulders and lumbar spine.
>
> Overall, there was no objective evidence of any residual musculoskeletal impairment attributable to the injuries sustained in the subject accident. Based on the history, physical examination, and review of documentations, Ms. Padhy injuries fall under the minor injuries guidelines as a result of the subject accident.

[23] In his addendum report prepared April 27 2017, Dr. Benfayed conducts a paper review and confirms his opinion that the applicant suffered soft tissue injuries.

[24] Again, on August 29, 2017, Dr. Benfayed was asked to indicate whether or not his opinion as stated in his original assessment has changed. Dr. Benfayed was

provided a complete set of additional medical documents including clinical notes and records of the Markham Stouffville Hospital, radiology of the cervical spine, thoracic spine, right ribs and chest, MRI of the right shoulder, MRI of the thoracic spine, clinical notes and records of Toronto Rehabilitation, and clinical notes and records of the various doctors who treated the applicant.

[25] Based on his review of all the above mentioned information, Dr. Benfayed confirmed his original assessment that the applicant suffered minor injuries and that she does not suffer an inability to perform her pre accident employment tasks as a result of the accident. He stated, “Overall, there was no objective evidence of any residual musculoskeletal impairment attributable to the injures sustained in the subject accident. Based on the history, physical examination, and review of documentations, Ms. Padhy’s injuries fall under the minor injuries guidelines as a result of the subject accident. Therefore Ms. Padhy does not suffer a substantial inability to perform her pre accident employment tasks as a result of subject motor vehicle accident.

[26] Based on the above, I find that the applicant has failed to satisfy me that the injuries sustained were more than minor.

Does the Applicant Suffer from Chronic Pain so as to Remove Her from the MIG?

[27] The applicant submitted that she suffers from chronic pain and, if accepted, would remove her from the MIG, as the prescribed definition of “minor injury” does not include chronic pain conditions.

[28] The applicant submits that the disability certificates completed by her chiropractor, indicates whiplash associated disorder, sprain and strain of the cervical, thoracic, lumbar spine, nerve injury, trouble sleeping and anxiety.

[29] As a result of these injuries, the applicant has sustained intermittent pain, as evidenced by the various doctors’ notes and records as well as the chiropractor notes submitted.

[30] A chronic pain assessment was conducted by Dr. Jason Mazzarella, a pain doctor, on January 12, 2018. In his report, Dr. Mazzarella finds that the applicant does suffer from chronic pain due to both musculoskeletal injuries and changes that have occurred to her nervous system over time, noting that 1 in 5 Canadians suffers from chronic pain. His ultimate diagnosis is that the applicant “has suffered an injury as the direct result of the motor vehicle accident mentioned above which is now chronic in nature.”

[31] In his report, Dr. Mazzarella sets out the various criteria he considered in reaching his conclusion. These criteria include a withdrawal from work. It is important to note that the applicant had returned to work in July 2017 and she had been working for six months by the time Dr. Mazzarella completed his assessment.

[32] Dr. Mazzarella finds that the applicant has excessive dependence on health care providers, spouse of family. In making this statement Dr. Mazzarella relies on the applicant's own self reports. However, in the surveillance report and the applicant's own self reports to other various physicians the applicant is able to perform household tasks, do grocery shopping, work, etc. On some days she is pain free and engages in hiking, walking or swimming.

[33] As such, while I do not doubt the expertise of Dr. Mazzarella, I am concerned about the information provided to him by the applicant during the assessment with respect to her level of activity.

[34] The applicant was also assessed by Dr. Kumbhare, an associate clinical professor of medicine and rehabilitation and rheumatology, on January 17, 2018. In his report, Dr. Kumbhare states that he has reviewed the results of examinations previously performed and performed his own examination. He concluded that "Ms. Padhy has chronic myofascial pain syndrome with sensitization." He recommended physiotherapy to assist with her range of motion and endurance. He does not conclude that the applicant's pain is as a result of the motor vehicle accident.

[35] In contrast to the claim of chronic myofascial pain syndrome, the respondent submits that the applicant suffered soft tissue injuries and nothing more and relies on the reports of Dr. Benfayed to refute the claim of chronic pain. Dr. Benfayed's findings and opinion are set above so there is no need to repeat them here.

[36] Based on the evidence set out by the parties I must consider the conflicting opinions set above to determine if indeed the applicant suffers from chronic pain. Factors to consider include whether the applicant suffers severe and constant pain – more than ongoing, recurrent or sporadic pain, if the pain has persisted well beyond normal time for hearing, and if it disrupts or disable pre-accident activities of daily living. I must also determine if the chronic pain is a result of injuries suffered from the motor vehicle accident

[37] Based on these criteria, I find the applicant has not satisfied me that she suffers from chronic pain as a result of injuries sustained from the motor vehicle accident for the following reasons.

[38] In reviewing both the medical records as well as the chiropractor's notes, there are sporadic entries of the applicant complaining about muscle spasms, headaches, neck and low back pain but, equally as main, reports of the pain being significantly reduced. The records fail to establish that the applicant complained of persistent chronic pain issues causing functional impairment or disability over the course of several appointments. Further, the applicant was able to return to work on July 27, 2017, several months prior to her chronic pain assessment. The applicant was seen grocery shopping and carrying the groceries into her house. All of these activities an individual who is capable of performing her pre-accident activities of daily living.

[39] As such, I do not find the applicant suffers from chronic pain so as to remove her from the MIG.

Treatment & Assessment Plans

[40] As I have found that the applicant's injuries are predominantly minor and she has exhausted the $3,500.00 funding limit for medical and rehabilitation benefits, it is not necessary for me to determine the reasonableness and necessity of the treatment plans in dispute.

Is the Applicant entitled to receive an IRB from October 26, 2016 to July 22, 2017?

[41] The applicant's position is that she is entitled to an IRB in the amount of $400.00 weekly from October 26, 2016 to July 22, 2017 since, she argues, she suffered from a substantial inability to perform the essential tasks of her pre-accident employment as a result of the injuries she sustained from the accident. She was employed for 18 months at the time of the accident. The applicant did receive employment insurance while out of work in the amount of $10,400.

[42] The test for entitlement to IRBs within the first 104 weeks following an accident is set out in s. 5(1)1(i) of the Schedule. The insurer is required to pay an IRB to an insured person who sustains an impairment as a result of an accident, was employed at the time of the accident, and, as a result and within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment.

[43] While it is not disputed that the applicant sustained an impairment as a result of the accident and was employed at the time of the accident, the question is whether she is precluded from seeking an IRB for non-compliance with section 33 of the Schedule and if she is eligible, did she suffer a substantial inability to perform the essential tasks of her employment.

[44] With respect to the issue of non-compliance the insurer did send several letters to the applicant requesting additional information. The letters were sent on December 20, 2016, January 12, 2017, February 3, 2017 and December 1, 2017. The December 1, 2017 letter stated the following:

> "Please also refer to our letter dated Feb 3, 2017 where in you were advised that under section 33 of Statutory Accident Benefits Schedule, we requested information which was due in our office on Feb 27, 2017 and to date we have not received the same. Please keep in mind no benefits are payable until the information is provided
>
> Please also refer to Insurer's Examination Report conducted by Dr Hamdi Benfayed. It is the opinion of the assessor that you do not suffer from a substantial inability to perform pre-accident employment tasks as a result of the subject motor vehicle accident .Therefore you are no longer eligible for an Income Replacement Benefit as of Feb 28, 2017."

[45] The following information was requested:

- OCF2 also informs the time off work from August18-Sept18, 2016, Please clarity for what reason was the time off work (vacation, shortage of work, sick etc.)
- OCF2 also has an income in week 3 (August29-Dec2) as $702.00 Please clarify with the breakdown for the weeks
- OCF2 has an income in week4 (Dec5-9) as $684.00. , Please clarify what is this income for (return to work, vacation, sick leave) etc. .
    - Please provide us with all post accident income paystubs
    - Please provide us with a complete copy of your Employment Insurance benefit file, including your application, start date, end date and the gross amount received per week.
    - Please clarify the type of employment insurance received, when did the employment insurance started as we notice from Record of employment last date worked is 25/10/2016 and on application of accident benefits (OCF1) date worked till 26/10/2016 and in one of the print out of the EI Claim we notice start date as 23/10/2016 and also says return to work on Dec 26, 2016 – please clarify
- Under section 33 of Statutory Accident Benefits Schedule we request the above and is due in our office by Feb27,2017 Please keep in mind no benefits are payable until the information is provided

[46] Section 33 of the Schedule requires that an applicant, within 10 business days after receiving a request from the insurer, provide the insurer with any information

reasonably required to assist the insurer in determining the applicant's entitlement to a benefit. The evidence above clearly indicates the insurer was acting appropriately under s. 33 of the Schedule.

[47] After hearing submissions from the parties and reviewing the evidence, I am not persuaded that the applicant suffered a substantial inability to perform the essential tasks of her pre-accident employment as a result of the accident. The following factors were persuasive in reaching this conclusion:

i. The applicant returned to work immediately after the accident for a period of five weeks ending October 26, 2016.
ii. There are conflicting statements given to doctors that she had "not worked since the accident" yet she worked for approximately five weeks after the accident.
iii. The first disability certificate was only completed on November 1, 2016.

[48] The applicant advised Dr. Benfayed, when he saw her on February 13, 2017, that she couldn't do anything. She also told him, as set out in his report, that "Ms. Padhy has not returned to work since the accident." She also told him that since the accident she has not returned to any of the housekeeping tasks that require carrying or lifting. This evidence is contrary to what was observed through surveillance and the fact that Ms. Padhy returned to work immediately after the accident for five weeks.

[49] For the above reasons, the applicant has failed to establish that she suffered a substantial inability to perform the essential tasks of her pre-accident employment as a result of the accident.

ORDER

[50] For the reasons outlined above, I find:

i. That the applicant sustained a minor injury as defined under the Schedule.

ii. The applicant is not entitled to payment for the cost of medical benefits claimed or the cost of assessments because the applicant has exhausted the funding provided for under the MIG. As no benefits are payable, it follows no interest is payable.

iii. That applicant is not entitled to any income replacement benefits.

iv. There will be no order as to an award.

Released: May 8, 2020

Maureen Helt
Vice Chair