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

Ontario

Citation: M.V. vs. Pembridge Insurance Company 2020 ONLAT 18-012745/AABS

Released Date: 05/28/2020
File Number: 18-012745/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:

M.V.

Applicant

and

Pembridge Insurance Company

Respondent

DECISION

ADJUDICATOR: **Jesse A. Boyce**

APPEARANCES:

For the Applicant: Darcie Sherman

For the Respondent: Maia Abbas

Heard by way of written submissions

OVERVIEW

[1] M.V. was involved in an automobile accident on **July 23, 2015** and sought medical benefits and a non-earner benefit ("NEB") from the respondent, Pembridge, pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (the "Schedule").* Pembridge denied the NEB based on its determination that M.V. did not suffer a complete inability to carry on a normal life and denied the treatment plan in dispute because it was not reasonable and necessary. M.V. disagreed and submitted an application to the Tribunal for resolution of the dispute.

ISSUES TO BE DECIDED

[2] The following issues are in dispute:

i. Is the applicant entitled to receive a **non-earner benefit** in the amount of $185.00 per week for the period of January 19, 2017 to date and ongoing?

ii. Is the applicant entitled to receive a **rehabilitation benefit** in the amount of $3,414.16 for medical rehabilitation assessment, recommended by Momentum Chiropractic & Sport Therapy Clinic Inc. in a treatment plan dated December 7, 2016, and denied by the respondent on December 30, 2016?

iii. Is the respondent liable to pay an **award under Regulation 664** because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[3] I find M.V. is not entitled to payment for a NEB for the period in dispute as she has not met her onus to prove that she suffers from a complete inability to carry on a normal life as a result of the accident.

[4] I find M.V. is not entitled to payment for the treatment plan in dispute as she has not demonstrated that it is reasonable and necessary. On the evidence, I find an award is not appropriate.

ANALYSIS

Non-Earner Benefits

[5] In order to receive a NEB, M.V. must prove that she suffers a complete inability to carry on a normal life as a result of the accident. A person suffers a complete inability to carry on a normal life as a result of an accident if the person sustains an impairment that continuously prevents them from engaging in substantially all of the activities in which they ordinarily engaged before the accident and they are not entitled to an income replacement benefit.[1] The seminal case of *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391 ["*Heath*"] requires an assessment of the applicant's pre-accident activities and life circumstances over a reasonable period of time prior to the accident.[2]

[6] M.V.'s pre-accident medical history is notable for a scoliosis diagnosis when she was 15, a wrist fracture in 2002 and a slip and fall in October 2014. It appears that all of these conditions continue to affect her post-accident. Accordingly, I find the evidence led concerning M.V.'s pre-accident activities and life and how her impairments as a result of the accident have led to a complete inability to carry on with them post-accident did not, in my view, meet the requirements of the stringent NEB test. On the evidence, I find that M.V. is not entitled to a NEB for the period in dispute as she has not demonstrated a complete inability to carry on a normal life as a result of injuries she sustained in the accident.

[7] In support of her position, M.V. relies on the hospital records from July 23, 2015 indicating she was suffering from neck, left wrist, back and leg pain as a result of the accident. She further relies on the clinical notes and records of her family physician, Dr. Yu, detailing her pain complaints and diagnosing her with depression, PTSD, anxiety and chronic pain. A referral to Dr. Gladstone, neurologist, in January 2017, resulted in a diagnosis of post-traumatic headaches, advanced scoliosis, sleep disturbance and a recommendation for a chronic pain management clinic. M.V. also relies on the psychological assessment report of Dr. Gladshteyn from May 2016 who diagnosed her with major depressive disorder, single episode, moderate to severe, with anxious distress and specific driving phobia. Following the accident, M.V. also attended for treatment at MediPlus and a Disability Certificate ("OCF-3") dated August 6, 2015, prepared by Dr. Glazos, chiropractor, lists her various impairments and

[1] O. Reg. 34/10, at ss. 3(7)(a) and s. 12(1).
[2] *Heath* at para. 50.

ultimately found M.V. was substantially unable to perform housekeeping tasks and suffered from a complete inability to carry on a normal life.

[8] In response, Pembridge contends that M.V. does not suffer a complete inability to carry on a normal life as a result of the accident that occurred on July 23, 2015. Rather, Pembridge submits that prior to the accident, M.V. was on ODSP and was unable to work due to her back pain that is caused by scoliosis, her PTSD and depression. Pembridge argues that M.V. has not demonstrated that her functioning substantially changed after the accident or that any change in function post-accident was as a result of the accident and not due to her remarkable pre-accident medical history. In support of its position, Pembridge relies on the reports of Dr. Czok, physiatrist, Dr. Mandel, psychologist and Ms. Oh, occupational therapist, from its s. 44 multi-disciplinary Insurer's Examination ("IE"), who all determined that M.V. did not suffer a complete inability to carry on a normal life as a result of the accident.

[9] While M.V. submits that her post-accident "life has changed a great deal" I find there was limited evidence led concerning M.V.'s pre-accident activities and how her accident-related impairments—as opposed to her pre-existing psychological and scoliosis conditions—have led to a complete inability to carry on with them post-accident. Paragraphs 34-40 of her submissions outline how her impairments affect her function pre-slip and fall, pre-accident and post-accident. I find the details provided are somewhat vague and lacking in particulars. Post-slip and fall, M.V. submits that she was able to cook, dust, do light grocery shopping and do laundry but received assistance from her parents to complete gardening and garbage removal. Post-accident, however, M.V. states that she is unable to do any of her housekeeping tasks and relies instead on her parents and boyfriend due to her bilateral wrist pain and numbness but cites no other injuries as the cause of her inability to do these tasks. In addition, due only to her bilateral wrist pain and numbness, she allegedly cannot do personal care tasks, but only hair drying is cited as an example. Problematically, there is no analysis of any other tasks in her submissions, which left the Tribunal with more questions than answers, namely: Do M.V.'s wrist issues (or back pain or psychological issues) prevent basic personal care, like bathing, brushing her teeth, or using the bathroom? If so, who assists her with these tasks? In my view, these are important questions because the s. 44 IE report from Ms. Oh states that M.V. reported she can shower and wash her hair but that it just takes longer. Further, the same report reveals that M.V. stated she could make a meal for herself, clean up after herself and use the front-loading washer on her own.

[10] In a similar vein, M.V.'s submissions do briefly speak to her pre-accident leisure activities, identified as socializing, tennis, rollerblading, canoeing, cycling, rock-climbing, walking and going to the gym. Her submissions indicate that, post-accident, she is completely unable to do any of these things. While listing these activities is a start, M.V. offered no comparison of the amount of time she spent on each of these pre-accident activities or on how much value and importance she placed on each. M.V. also failed to show how her accident-related impairments have impacted her ability to carry on with her pre-accident activities and how this post-accident functional impairment differs from her pre-accident impairment. It is not sufficient to simply say that activities cannot be done, there must be an analysis as to why they cannot be done.

[11] In the absence of this information, it is difficult to compare her pre and post-accident capabilities with respect to the activities she ordinarily engaged in or valued, as *Heath* requires, and especially so considering the difficulties she faced pre-accident due to her psychological impairments and the recurring pain caused by her scoliosis. Again, the Tribunal was left with more questions than answers: How often did M.V. play tennis, rollerblade, cycle? What prevented her from doing these activities, her back pain or her wrist? How does her wrist injury prevent her from taking long walks or rollerblading? How to reconcile her alleged inability to socialize with her statement in the OT report that she has continued to socialize now but has more fear? Further, the OCF-18 in dispute here, addressed below, also indicates in part nine that M.V. has "increased her function and returned to the gym and physical exercise" in December 2016, which is one month before the period of M.V.'s seeks NEB entitlement to here.

[12] While not specifically required by the legislation, M.V. did not rely on any affidavit or *viva voce* evidence to speak to the *Heath* factors for this written hearing. Indeed, her NEB arguments are supported only through her subjective reporting to assessors. As a result, I have limited evidence to base M.V.'s claims on and, in my view, not enough to meet the stringent NEB test. I only have six paragraphs of assertions that she has a complete inability to carry on a normal life with limited support as to how the injuries sustained—physical or psychological—*as a result of the accident* have affected her daily routines, her function or her most valued activities, from an objective measure. I find this oversight is fatal to her claim in proving that it was the accident that led to her alleged complete inability to carry on a normal life because I do not have a current snapshot of what constitutes her normal day to day life post-accident and how it has changed from her pre-accident life. Even the OCF-3 on which she relies was completed in August 2015, but the period she claims NEB entitlement to begins in January 2017. No updated OCF-3 or medical opinion speaking to the

NEB test was completed to speak to this gap and how her accident-related impairments may have improved or regressed in this time.

[13] Indeed, while I have a surface understanding of M.V.'s pre and post-accident activities based on her self-reporting to assessors, I find there is no substantive comparison of the amount of time she spent on these activities (for example: How often did she cook or do the laundry before? What types of social activities is she missing out on now because of her accident-related fear? How long does her personal care routine take post-accident compared to pre-accident? Is she incapable of living alone now so she must reside with her parents? How much sleep did she get pre-accident vs. post? Can she still attend her appointments, take her medication? *etc*.) or on how much value and importance she placed on each. While I am alive to M.V.'s psychological diagnoses and reports of pain that can rise to 8-9/10 (and a constant 10/10, as reported to Dr. Mandel), I also find that she is not completely unable to do many things based on her own self-reporting to assessors.

[14] For example, in the IE report of Ms. Oh, while M.V. reported ongoing whole body pain, she "was observed to complete sit-stand transfers, handle very light items, walk within a small area of the house in which she is staying, reach above her head, reach to mid-shin level in sitting, negotiate a couple of stairs, sit ~45 minutes with minimal weight shifting, and walk/stand for a few minutes. No loss of balance was noted throughout the assessment. She was noted to have a slightly slowed pace and unaltered gait during the assessment. Functional testing was extremely limited due to declining of tasks and limited access to the environment." In the IE report of Dr. Czok, physiatrist, it is reported that M.V. stated that "she remains independent with regards to her personal care-related tasks, except styling her hair. She is not involved in any housework. She has resumed driving, but she continues to experience fear of driving and she only drives in local area. Based on the physical examination, the claimant currently has no functional limitations or physical restrictions to perform the essential tasks of daily living as a direct result of the injuries sustained in the accident." Even M.V.'s family physician notes are not particularly helpful to her, as Dr. Yu's notations from February and April 2017 indicates M.V. was going on vacation for three weeks and had been going to the gym for two months. These notes are from the same period that M.V. is seeking NEB entitlement.

[15] The majority of M.V.'s submissions focused on her pain and how it impedes her day-to-day living. Where pain is a primary factor, it must be considered whether performing the activity with pain is such that the individual is *practically prevented*

from engaging in those activities.[3] On M.V.'s reporting of her daily activities, I find that she does suffer from pain, as she reports the pain can rise to 10/10 on the pain scale and that she has a reduced ability to perform some of her housekeeping activities. However, although I find M.V. experiences pain, I find on the evidence that her pain does not *practically prevent* her from the majority of her independent self-care tasks or engagement in her daily activities: she can shower, wash her hair, cook meals, drive herself, go to the gym, *etc*. With regards to the activities she has identified as bringing her enjoyment pre-accident, M.V. has not demonstrated how her pain practically prevents her from engaging in these activities. In submissions, she only cites her bilateral wrist pain as preventing her from doing housekeeping and personal care tasks but provides no specific analysis.

[16] The *Heath* test provides that the applicant may identify their "valued" activities of daily living and submit how, as a result of the accident, their most valued activities have fundamentally changed due to pain, thus resulting in a complete inability to carry on a normal life. Activities identified by an applicant as being highly valued attract more weight. In her materials, M.V. did not identify activities that she placed greater weight or value on pre-accident but remarked how much she previously enjoyed rock climbing in her reply. While I accept that M.V. may be prevented from rock climbing post-accident, I do not accept the inability to rock climb, if true, constitutes a complete inability to live a normal life.

[17] Similarly, while I accept that M.V. suffers from psychological symptoms, there is no analysis explaining how M.V.'s psychological issues affect her day to day function to warrant entitlement to a NEB on that basis. Dr. Mandel's IE reports that M.V. self-reported feelings of worthlessness, uselessness and hopelessness that result in a loss of interest in social interactions, however, there remains no analysis on what this entailed pre-accident and how it has changed post-accident. Dr. Gladshteyn's report, which I did find to be reliable and reasonable in its analysis, finds severe depression and severe anxiety, opining that M.V.'s pain, headaches and low mood affect her social, recreational and activities of daily living. He recommends psychological treatment but does not actually opine on the NEB test from a psychological perspective.

[18] In Dr. Mandel's report, M.V. reports some anxious and panic symptomatology in the context of operating or travelling in a vehicle and reportedly continues to drive, however, reports that she is much more "cautious and hyper vigilant" which suggests, in my view, a functional awareness of her surroundings that would

[3] *Heath, supra* note 2 at para 50.

disqualify any safety threat. In terms of activities of daily living, she reports that prior to the index accident, she shared activities with her ex-spouse, but it is unclear if they remain together based on her reporting to assessors. M.V. also reported to Dr. Mandel that she is living at her parent's house, staying on their couch and that her parents are cooking and doing the laundry and grocery shopping. Without more context or analysis, it is unclear if her sleep issues are related to sleeping on a couch, her pain or her psychological impairments. Further, these comments also make it unclear if M.V.'s parents cook, do the laundry and grocery shop because it is their house or because M.V. cannot functionally do these things herself. Again, more detail is needed.

[19] While M.V. takes issue with Pembridge relying on the multi-disciplinary IE reports, I tend to agree with the report of Ms. Oh, that M.V. "provided vague and inconsistent reports of her pre-MVA and current function," which I find was not clarified in her submissions or her analysis of her pre and post-accident function. On the medical evidence, I find little reason to depart from the largely uncontroverted findings of the s. 44 assessors that M.V. does not suffer from a complete inability to carry on a normal life as a result of the accident. The onus to prove entitlement to a NEB for the period in dispute rests with M.V. and while I find that M.V. has physical and psychological challenges that have affected her for quite some time, I do not find that she has satisfied her onus to prove that she has a complete inability to carry on a normal life *as a result of the accident* that occurred on July 23, 2015. M.V. is therefore not entitled to a NEB for the period in dispute.

Is the treatment plan reasonable and necessary?

[20] Under s. 15 of the *Schedule*, an insurer shall pay for all medical treatment that is reasonable and necessary as a result of an accident. M.V. bears the burden of proving that the specific treatment is reasonable and necessary to address her specific impairments on a balance of probabilities.

[21] Here, M.V. claims entitlement to a treatment plan in the amount of $3,414.16 for chiropractic and massage therapy recommended by Momentum Chiropractic & Sport Therapy Clinic Inc. in an OCF-18 dated December 7, 2016. M.V. submits the treatment is reasonable and necessary to aid in her physical rehabilitation because she suffers from a number of physical injuries—identified on reply as bilateral wrist pain and numbness, neck pain and headaches—which have made it impossible for her to return to her pre-accident level of functioning. M.V. submits that the treatment is vital to prevent her from "being trapped in a cycle of physical and psychological pain."

[22] In response, Pembridge submits that the treatment plan is not reasonable and necessary and relies on the s. 44 opinion of Dr. Czok who found that M.V. had reached maximum medical improvement from her accident-related impairments, that M.V. did not require further facility-based treatment and that she would benefit from a self-directed exercise program.

[23] I find the chiropractic and massage treatment is not reasonable and necessary. In various reports, M.V. reported to assessors that she does not find treatment helpful and that nothing improves her level of pain. The contemporaneous note of Dr. Yu from December 2016 indicates that her once per week physiotherapy treatment "was not improving" her pain and Dr. Yu does not refer her for any facility-based treatment. The notes do indicate a referral by Dr. Yu for chronic pain management, but this does not appear to be for M.V.'s bilateral wrist pain and numbness, neck pain and headaches, which she submits makes this specific treatment reasonable and necessary.

[24] On review of the OCF-18 itself, there is limited detail on how the chiropractic and massage treatment will specifically address M.V.'s specific accident-related issues, or which issues the treatment will address generally, since the impairments are identified as sprain and strain injuries and headaches. The goals of the treatment are to reduce pain, increase strength and get M.V. back to her daily activities. While these are legitimate goals for treatment, the OCF-18 also indicates in part nine that M.V. has allegedly "increased her function and returned to the gym and physical exercise" at the time it was submitted, so I question the necessity of over $3,000 worth of treatment where M.V. has indicated nothing helps her pain and she allegedly is already functionally exercising.

[25] While the clinic notes were helpful in proving that M.V. regularly attended for treatment prior to the accident and thereafter for her wrist and pain, I find more analysis of why continued treatment was reasonable and necessary is required, and especially so to rebut Dr. Czok's reasoned opinion, which I prefer, that M.V. had reached maximum medical improvement from her accident-related impairments, that M.V. did not require further facility-based treatment and that she would benefit from a self-directed exercise program. On the evidence, I find no reason to interfere with Pembridge's determination that the treatment requested is not reasonable and necessary on the strength of Dr. Czok's report.

Award and Interest

[26] M.V. also claims entitlement to an award under s. 10 of *O. Reg. 664* due to Pembridge unreasonably withholding her NEB after paying same from January 21, 2016 to January 18, 2017 and then terminating the benefit despite evidence

that she meets the NEB test. Under s. 10, the Tribunal may award up to 50% of the total benefits in a dispute if it determines that the insurer unreasonable withheld or delayed payment of benefits to an applicant.

[27] On the evidence, I find an award is not appropriate. I find Pembridge paid the NEB in good faith based on its obligations under the *Schedule* and then, after conducting valid s. 44 IE's, terminated the NEB based on various medical opinions that M.V. did not suffer a complete inability to carry on a normal life as a result of her accident-related injuries. I find no evidence of unreasonable conduct or the improper withholding of benefits to warrant an award.

[28] As no benefits are overdue as a result of this application, it follows that interest pursuant to s. 51 of the *Schedule* does not apply.

CONCLUSION

[29] I find M.V. is not entitled to payment for the NEB for the period in dispute as she has not demonstrated that she has a complete inability to carry on a normal life as a result of the accident.

[30] I find M.V. is not entitled to payment for the treatment plan in dispute as she has not demonstrated why it is reasonable and necessary. On the evidence, I find an award is not appropriate.

Released: May 28, 2020

Jesse A. Boyce
Adjudicator