Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Nguyen vs. Allstate Canada, 2021 ONLAT 19-006606/AABS

Released Date: 03/23/2021
File Number: 19-006606/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:

Bao Nguyen

Applicant

and

Allstate Canada

Respondent

DECISION AND ORDER

VICE-CHAIR: **D. Gregory Flude**

APPEARANCES:

For the Applicant: Sheryl Patel, Counsel

For the Respondent: Sonya Katrycz, Counsel

HEARD: **By Way of Written Submissions**

REASONS FOR DECISION AND ORDER

OVERVIEW

[1] The applicant, Bao Nguyen, was involved in an automobile accident on May 26, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*") O. Reg 34/10. He was denied benefits by the respondent, Allstate Canada ("Allstate"), so he has submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") seeking an order that he is entitled to the benefits he seeks.

[2] The benefits Mr. Nguyen seeks fall into two categories: payment for physiotherapy treatment and an income replacement benefit ("IRB"). Allstate submits that Mr. Nguyen suffered only minor injuries in the accident with the result that the coverage limit under the *Schedule* is $3,500. He seeks treatment in excess of $3,500 and Allstate submits that it is not liable to pay for it.

[3] The initial test for an IRB for the first 104 weeks is that Mr. Nguyen must have suffered a substantial inability to carry out the essential tasks of his employment (*Schedule* s. 5(1)2ii). After 104 weeks following the accident the entitlement test becomes a complete inability to engage in any employment for which he is qualified by education, training or experience (*Schedule* s. 6(2)(b)). Allstate submits that there is no evidence that Mr. Nguyen meets either the pre- or post-104-week test of entitlement to an IRB. Mr. Nguyen relies on the report of Dr. Tajedin Getahun, an orthopaedic surgeon, that finds he is completely incapable of engaging in any employment for which he is qualified by education, training or experience.

ISSUES

[4] The issues in dispute agreed at the case conference are as follows:

i. Are the applicant's injuries predominantly minor as defined in s. 3 of the *Schedule*, subject to treatment within the $3,500.00 limit in the *Minor Injury Guideline*?

ii. Is the applicant entitled to receive an income replacement benefit in the amount of $400.00 per week for the period June 2, 2017 to date and ongoing, less any post accident income?

iii. Is the applicant entitled to a medical benefit in the amount of $2,569.40 for physiotherapy treatment recommended by See Chung Lo in a

treatment plan (OCF-18) dated July 9, 2019, and denied by the respondent on July 30, 2018?

iv. Is the applicant entitled to a medical benefit in the amount of $1,384.70 for physiotherapy treatment recommended by Jia En Mai in a treatment plan (OCF-18) dated November 15, 2017, and denied by the respondent on December 1, 2017?

v. Is the applicant entitled to a medical benefit in the amount of $1,977.05 for physiotherapy treatment recommended by Yaroslav Nikolaovich Bumbiko in a treatment plan (OCF-18) dated September 28, 2017, and denied by the respondent on October 20, 2017?

vi. Is the applicant entitled to a medical benefit in the amount of $3,696.50 for physiotherapy treatment recommended by Tan Thanh Vong in a treatment plan (OCF-18) dated June 2, 2017, and denied by the respondent on June 25, 2017?

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

FINDINGS

[5] Mr. Nguyen carries the onus of establishing that he is entitled to coverage in excess of $3,500 limit for predominantly minor injuries set out in s. 18(1) of the *Schedule* (see *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII) para 20). He has failed to meet his onus. He bases his claim that his injuries are not minor on the report of Dr. Getahun dated January 14, 2020 finding that he suffers from chronic pain syndrome. Dr. Getahun has overstated Mr. Nguyen's condition. I do not find Dr. Getahun's diagnosis of chronic pain syndrome convincing because he has misapplied the factors to be taken into consideration. I find Mr. Nguyen suffers from predominantly minor injuries and is subject to the $3,500 coverage limit in the *Schedule*.

[6] Mr. Nguyen bases his claim for an IRB on a Disability Certificate ("OCF-3") dated April 11, 2018 and the same report of Dr. Getahun. While Mr. Nguyen's financial disclosure may be best described as confusing at the very least, I find that Dr. Getahun largely bases his opinion that Mr. Nguyen cannot perform the essential tasks of his employment on too narrow a survey of his education, training and experience. I find that Mr. Nguyen has failed to satisfy his onus to establish that he is entitled to an IRB.

INJURIES ARE SUBJECT TO $3,500 COVERAGE LIMIT IN S. 18(1)

[7] I find that Mr. Nguyen has suffered from predominantly minor injuries. The term "minor injury" is defined in s. 3 of the *Schedule* 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." By virtue of s. 18(1), "the sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed $3,500 for any one accident." The use of the word "predominantly" in s. 18(1) extends the limitation beyond simply minor injuries to include injuries not listed in s. 3 and changes the focus to the impairment that the sustained injuries have caused. By way of example, a person may have developed a psychological condition as a result of an accident, but if there is no impairment of function arising out of that condition, the injuries remain predominantly minor injuries and the person remains subject to the $3,500 limit.

[8] In his report, Dr. Getahun diagnoses Mr. Nguyen with: "chronic myofascial strain of the cervical spine" and "chronic myofascial strain of the lumbosacral spine." The use of the word "chronic" does nothing to change the underlying nature of the injuries, that is, strains of the upper and lower spine and his diagnosis falls squarely within the definition of "minor injury" in s. 3. Chronic used in this context simply means that the strain has lasted a long time, as opposed to acute, meaning a shorter-term condition.

[9] Interestingly, in his examination, Dr. Getahun does not find that Mr. Nguyen suffered from "radiculopathy" as suggested in the disability certificate (OCF-3) prepared by Dr. Khan, a chiropractor, on April 11, 2018. Radiculopathy is damage to the nerve root as it exits the spine and may cause pain, weakness and numbness of those areas of the body served by that particular nerve.

[10] The factor that Dr. Getahun relies on to remove Mr. Nguyen from the minor injury limit is that Mr. Nguyen has developed a condition known as chronic pain syndrome, a heightened sensitivity to pain after the physical cause of the original pain has resolved. As Dr. Getahun points out it has a psychological component.

[11] In arriving at his conclusion, Dr. Getahun relies on the definition of chronic pain syndrome set out in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 ("4th Edition"). He identifies two factors set out in the 4th Edition that Mr. Nguyen satisfies in meeting the test. His report states:

> Mr. Nguyen's presentation is consistent with development of chronic pain syndrome affecting the cervical and lumbosacral spine. He satisfies the AMA Guides diagnostic criteria for chronic pain syndrome contained in the 4th Edition. He satisfies the duration criteria. He satisfies the dysfunction criteria. In my opinion he is likely to satisfy the depressive criteria with appropriate assessment. The presence of two or more diagnostic criteria is considered to establish a presumptive diagnosis of chronic pain syndrome.

[12] Allstate submits that the test applied by Dr. Getahun is outdated. It has been superseded by the definition of chronic pain syndrome set out in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 6th edition, 2008 ("6th Edition"). Neither party provided me with a copy of the section of the 4th or 6th Editions they rely on. Thus, I am unaware if Dr. Getahun is correct that presence of two diagnostic criteria are sufficient to support a diagnosis. His language is interesting in that he says that two criteria "support a presumptive diagnosis" suggesting there may need to be more criteria to confirm the diagnosis. For the purpose of my analysis, however, nothing turns on my doubts about how robust Dr. Getahun's application of the 4th Edition may be, as I am of the opinion that the 6th Edition published in 2008 better reflects the development of defining and understanding chronic pain syndrome than the 4th Edition published 15 years earlier.

[13] I note that, while both the 4th Edition and the 6th Edition are referenced in the *Schedule*, the references relate to the test for a determination of catastrophic impairment set out in s. 3.1. Their definition of other conditions is not binding on the Tribunal, but as an authoritative source, they may be persuasive. Certainly, the parties argue that they are persuasive, one arguing for the application of the 4th Edition and the other for the 6th Edition.

[14] The question of which test to apply to determine a finding of chronic pain syndrome has been addressed by the Tribunal in the past. In *17-007825 v Aviva Insurance Canada*, 2018 CanLII 98282 (ON LAT), the Tribunal accepted the test for chronic pain syndrome set out in the 6th Edition, as do I. At paragraph [6] the Tribunal states:

> [6] Chronic pain is a severe, debilitating condition distinct from ongoing or recurring pain. Aviva submits that [The applicant]'s claim of chronic pain should be assessed against six criteria described in the American Medical Association (AMA) Guides, which state that at least three of them must be met for a diagnosis:

(1) Use of prescription drugs beyond the recommended duration and/or abuse of or dependence on prescription drugs or other substances.

(2) Excessive dependence on health care providers, spouse, or family.

(3) Secondary physical deconditioning due to disuse and or fear-avoidance of physical activity due to pain.

(4) Withdrawal from social milieu, including work, recreation, or other social contracts.

(5) Failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family or recreational needs.

(6) Development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors.

[15] Dr. Getahun finds Mr. Nguyen satisfies only two of the criteria from the test in the 4th Edition, dysfunction and duration. In his review of the file, Dr. Getahun does not note any use of prescription drugs beyond the recommended duration or abuse or dependence on prescription drugs. In fact, from the pharmacy records produced by Mr. Nguyen, it appears he filled prescriptions in November 2017, six months post-accident, and not before or after. Mr. Nguyen visited his family doctor five times in the year following the accident and eight times in the two years following, hardly indicative of excessive dependence on healthcare providers. There is no note of physical deconditioning in Dr. Getahun's report and Dr. Getahun does not find psychosocial sequelae, limiting himself to a comment that he feels they are likely to be present. As an orthopaedic surgeon, he is not qualified to give a psychological diagnosis.

[16] Based on the above, I find that Mr. Nguyen has failed to satisfy his onus to show that he suffered anything more than strain injuries. His injuries fall within the definition of "minor injury" and his entitlement to Allstate-funded treatment is limited to $3,500. Since it appears that he has exhausted that coverage limit, he is not entitled to further treatment.

NOT ENTITLED TO AN INCOME REPLACEMENT BENEFIT

[17] To succeed in a claim for entitlement to an income replacement benefit, according to s. 5(1)2.ii, Mr. Nguyen must establish on a balance of probabilities that, for the first 104 weeks post-accident, he suffered a substantial inability to

perform the essential tasks of his employment. Section 6(2)(b) states that after 104 weeks, that is from May 27, 2019 and ongoing, he must show that he has a complete inability to engage in any employment for which he is suited by education, training or experience. He relies on 2 documents to establish his entitlement. I find neither convincing.

[18] Mr. Nguyen submitted an application for accident benefits (“OCF-1”) to Allstate on June 6, 2017, approximately 12 days post-accident. The OCF-1 notes that he returned to work three days after the accident on May 29, 2017. Allstate responded on June 14, 2017 with an Explanation of Benefits (“EOB”) stating, “As per the OCF-1, you have indicated that your injuries prevented you from working May 26, 2017 and you returned to work May 29, 2017, 3 days post accident. As such, you are not eligible to [sic] the income replacement benefit.”

[19] In subsequent documents, Mr. Nguyen has asserted that he did not return to work on May 29, 2017 or at all. He submits that he has been unemployed since the accident and is unemployable. He submitted an OCF-3 on April 11, 2018, almost 11 months post-accident, stating that he could not carry out the essential tasks of his employment for “9 - 12 weeks” from the April 11, 2018. There is no explanation of why in April 2018 he needed to be off work for a period of 9 to 12 weeks or even a statement that he was unable to work since the accident. There is a statement that he has been unable to carry out his activities of daily living since the accident. There is also no further update to this OCF-3 indicating an inability to work after the lapse of 12 weeks.

[20] A review of the clinical notes and records of Mackenzie Medical Rehabilitation Centre, who provided treatment services shows that, from June 2017 through July 2018, Mr. Nguyen’s flexibility improved. Throughout, his lumbar spine flexibility was within normal limits, but he had restricted movement in his cervical spine which had returned to normal range of motion by July 2018 in some spheres but not completely in all spheres. In his Mackenzie intake form, dated June 2, 2017 he notes that he has not worked since the accident, again contradicting the OCF-1 submitted a few days later.

[21] The evidence is contradictory about Mr. Nguyen’s return to work within 104 weeks of the accident. The only evidence of an inability to work is a suggestion that he was unable to work for 9 – 12 weeks in and around April 2018, that is, from April through July 2018. There is nothing specific in the Mackenzie records that gives a reason for this inability to work other than back pain and nothing in his family doctor’s records to indicate that his doctor recommended a period off work.

[22] In his report, Dr. Getahun comments on the Mr. Nguyen's inability to work. He sets out a series of conclusions without reference to any specific training to draw such conclusions:

> In my opinion Mr. Nguyen's cervical and lumbar spine impairments preclude him from returning to his pre-accident employment. His work history is essentially in labour-type positions. His educational achievement is high school level. Therefore, I am of the opinion that he currently suffers a complete inability to engage in any suitable form of employment based on his education, training and experience. This is as a direct result of his accident related injuries.

[23] The test that Dr. Getahun is applying, of course, is the post-104-week complete inability test. He makes two statements upon which he bases his opinion, Mr. Nguyen has back pain and he has a high-school education. Implied, of course, is that Mr. Nguyen's job as a tiler involved him carrying heavy boxes of tiles. His report also notes that Mr. Nguyen had intermittent work experience and had only recently become a tiler. In my view it is quantum leap to reach the conclusion reached by Dr. Getahun that he was from here on forward only capable of manual labour and that type of work was foreclosed to him by strain-type injuries. There is no attempt to consider a range of possible employment.

[24] Overall, I find that Mr. Nguyen has failed to lead evidence sufficient to satisfy his onus that he is entitled to either a pre- or a post-104-week IRB.

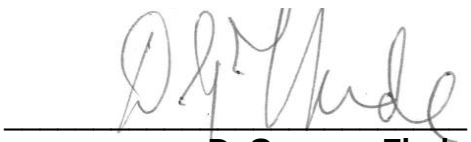
INTEREST

[25] Mr. Nguyen has claimed interest pursuant to s. 51 of the *Schedule*. That section mandates the payment of interest from the date a payment becomes overdue until it is paid. Since I have found Mr. Nguyen is not entitled to any of the benefits he seeks, no payments are overdue, and no interest is payable.

ORDER

[26] Mr. Nguyen's claim for an IRB and treatment beyond the $3,500 limit set out in s. 18(1) of the *Schedule* is dismissed.

Released: March 23, 2021



D. Gregory Flude
Vice-Chair