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: Frank Edosa vs. Intact Insurance Company, **2020 ONLAT 18-011405/AABS**

Released Date: March 25, 2020
Tribunal File Number: 18-011405/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:

Frank Edosa

Applicant

and

Intact Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Cezary Paluch**

APPEARANCES:

For the Applicant: Frank Edosa, Applicant
Mitchell Kent, Paralegal

For the Respondent: Tina Cumbo, Representative
John P Desjardins, Counsel

Court Reporter: Kristy Fulton, Asap Reporting

HEARD: In-Person: **February 24 and 26, 2020**

OVERVIEW

[1] The applicant, F.E. was injured in an accident on March 8, 2017, and sought benefits from the respondent, Intact Insurance Company, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] *(Schedule).*

[2] F.E. received payments for an income replacement benefit (IRB) which were suspended by Intact on October 23, 2017, on the basis of s. 44 Insurer's Examinations (IE) that determined S.H. no longer met the criteria for an IRB. F.E. disagreed with Intact's decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (Tribunal) for reinstatement of the IRB as well as payment of several treatment plans.

[3] The parties participated in two case conferences[2] but were unable to resolve their dispute and, thus, proceeded to this in-person hearing.

ISSUES TO BE DECIDED

[4] The following are the issues to be decided, as per the Case Conference Order dated September 9, 2019:[3]

i. Is the applicant entitled to receive a weekly income replacement benefit in the amount of $130.42 from October 23, 2017 to May 16, 2019?

ii. What is the amount of weekly IRB that the applicant is entitled to receive?[4]

iii. Is the applicant entitled to receive medical benefit for treatments with Alex Muir Wellness in the following amounts:

a. $3,153.76 for psychological treatment recommended by Dr. Leon Steiner in a treatment plan submitted January 8, 2018, denied by the respondent on January 8, 2018?

[1] O. Reg. 34/10.
[2] The applicant filed two applications in relation to the same accident. A case conference was held on April 2, 20119 (File # 18-011405) and second case conference on September 9, 2019 (File #19-003679). Both files were joined or combined. See Order of Adjudicator Ferguson dated September 9, 2019 (the "Ferguson Order").
[3] The monthly amount of the IRB was changed at the hearing by the applicant from $400.00 per week to $130.42 per week and the end date was changed from "to date and ongoing" to "May 16, 2019." The respondent did not oppose these changes.
[4] The parties agreed at the hearing that only entitlement is at issue and not entitlement ($130.42 per week).

b. $3,308.96 for chiropractic treatment recommended by Dr. Branko Millen in a treatment plan submitted May 11, 2018, denied by the respondent on May 23, 2018?

c. $4,089.60 for physiotherapy and chiropractic treatment recommended by Ginni Bajaj in a treatment plan submitted October 12, 2017, denied by the respondent on October 26, 2018?

iv. Is the applicant entitled to payments for the cost of examinations in the following amounts:

a. $1,850 for an attendant care needs assessment recommended by Dr. Branko Millen in a treatment plan submitted May 22, 2017, denied by the respondent on May 31, 2017?

b. $2,125.00 for a psychological assessment recommended by Dr. Leon Steiner in a treatment plan submitted August 14, 2017, denied by the respondent on August 24, 2017?

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

RESULT

[5] F.E. is not entitled to receive a weekly income replacement benefit in the amount of $130.42, as he has not demonstrated a substantial inability to perform the essential tasks of his pre-accident employment for the period in dispute.

[6] F.E. is not entitled to payment for any of the treatment and assessment plans including the cost of examinations, as they are not reasonable and necessary.

[7] As no IRB, or any other benefits are payable, F.E. is not entitled to any interest.

PRELIMINARY MOTION

[8] At the start of the hearing, the respondent brought a motion requesting three grounds of relief: (i) that certain documents be excluded from the hearing; (ii) that the applicant not be allowed to testify; and (iii) that the entire application be dismissed. I provided a verbal decision regarding this motion at the hearing and the hearing proceeded on the same day. These are my written reasons.

RESULT (MOTION)

[9] The respondent's motion is dismissed for the reasons that follow. Having so ruled, at the hearing, I allowed the parties to examine and cross-examine the

applicant regarding the alleged noncompliance and allowed the respondent to request any other relief in their final submissions.

ANALYSIS AND REASONS

[10] Rule 15 of the Tribunal's *Common Rules of Practice and Procedure* governs motions. Rule 15.2 provides that a party may have a motion heard at a hearing provided that the party serves and files a Notice of Motion and all supporting documentation at least 10 days in advance. Here, no Notice of Motion was served or filed by the respondent. In addition, despite Rule 15.1, the respondent neither sets out grounds for the motion nor provides evidence in support of the motion. All that I have is verbal submissions from counsel. Submissions are not evidence. Moreover, the applicant only found out about this motion last Friday and only received the cases respondent's counsel was relying upon this morning. In my view, the purpose of Rule 15 (especially when there is a pending scheduled hearing) is that parties are aware of any pending motions so as to adequately prepare for them.

[11] Also, procedurally it assists the parties and the Tribunal if motions are brought well prior to the start of the hearing to avoid any unnecessary delays and adjournments. Here, although I agree that the applicant's brief was served late, the other two issues that the respondent has raised came to light much earlier and could have been raised prior to today. Such issues are routinely brought before the Tribunal by way of a preliminary issues hearing (i.e. the hearing is bifurcated) because, if there is a dismissal of the entire application, the parties would avoid the time, effort and costs to prepare for a hearing that will potentially never proceed. As well, any motion--especially one that asks for drastic relief like a dismissal--should be brought prior to hearing or as soon as the moving party found out about the triggering event.

[12] Aside from the procedural breaches of Rule 15, and the related issues I have identified regarding the timing of this motion, the relief that the respondent is seeking is extraordinary as they are essentially requesting that the applicant's application be dismissed at the start of a hearing when parties are ready to proceed, and witnesses are prepared to testify. The grounds for dismissal without a hearing are set out in Rule 3.4 and are limited. Moreover, Rule 3.5 requires the Tribunal to give notice to the parties of its intent to dismiss a hearing and inform their right to make written submissions. This has not been done because the Tribunal was not aware of the respondent's request until today. Notably, the applicant had no opportunity to file any written submissions. On this reason

alone, I cannot dismiss the application. However, I will briefly address each of the respondent's grounds for relief on their motion.

i) ***Applicant's Brief Not Filed on Time***

[13] The respondent relies on Rule 9.4 and requests that the applicant's Document Brief, which was delivered to the respondent on Friday, February 21, 2020 (3 days prior to the first date of this hearing), ought to be excluded from the hearing and/or the applicant not be allowed to testify as it was not delivered on time pursuant to the Rules and/or Tribunal Order(s).

[14] The applicant concedes that the brief was served late but offers no explanation. However, the applicant's paralegal argues that the respondent has not been prejudiced in any way for two reasons. First, all of the documents were already in the respondent's possession and there are no new documents that have been provided. Secondly, the documents that the applicant intends to file are already included in the respondent's Brief, which was marked as Exhibit #1.

[15] I agree with the applicant. I fail to see how the respondent has been prejudiced by the late filing. More importantly, the same documents that the applicant is requesting be filed have already been included in the respondent's brief and made part of the hearing record. On that basis alone, the three Tribunal decisions that the respondent is relying on can be distinguished (in those cases, documents that were excluded were *new* documents). I also note that the respondent did not request additional time or an adjournment to review the applicant's documents to offset any prejudice and wanted to proceed. Accordingly, I marked the applicant's document brief as Exhibit #2 and the documents were entered into the record. Of course, this did not preclude the respondent from questioning the witnesses on these documents and asking me to assign the appropriate weight.

ii) ***S. 33 Non-Compliance***

[16] The respondent submits that the applicant has not complied with undertakings and/or Tribunal Order re productions which they say is a breach of Rule 9.4 and the application ought to be dismissed.

[17] The applicant submits that he produced some of the items while he made best efforts to request other items (but were not produced). Moreover, the applicant submits he is not required to produce further, other items as they are not relevant or that they are not required under his reading of s. 4(5) of the *Schedule*. The respondent relies on Rule 9.4 that states that if a party fails to comply with an

Order with respect to disclosure, then that party may not rely on the document or things or call the witness to give evidence without consent of the Tribunal. The Tribunal does not have an undertaking Rule and my reading of Rule 9.4 is that it deals with noncompliance with disclosure rules (i.e. when a party has failed to comply with directions and Orders of the Tribunal with respect to documents).

[18] In this case, this respondent's motion brought on the day of the hearing is untimely and left me in a difficult position to give a coherent decision in regards to the parties' arguments on productions. The record before me is limited and without any evidence to support each party's position on this issue to come to an adequate decision.

[19] The onus here is on the moving party claiming relief under Rule 9.4 to lay an evidentiary foundation for the relief being sought. As a result I allowed the respondent to question the applicant regarding this alleged failure to comply with the Tribunal disclosure rules, I allowed the applicant's paralegal to lead evidence regarding the productions, and the respondent in final submission may ask that I find an adverse inference be made against the applicant for failure to comply with the Tribunal orders or that a particular document be excluded pursuant to Rule 9.4.

[20] As a related matter, I do not read that non compliance with s. 33 results in a breach of Rule 3.4(c) that "the statutory requirements for bringing the appeal have not been met". Section 33(6) of the *Schedule* provides the relief for the noncompliance complained of by the respondent: the benefits are suspended. The respondent has not provided me any Tribunal decisions where Rule 3.4 was utilized to request that an application be dismissed based on alleged noncompliance with s. 33 of the *Schedule*. I also point to the Tribunal decision in *17-002921 v Aviva Insurance Canada*,[5] where the Tribunal addressed s. 33 non compliance: the relief ordered by the Tribunal was grounded in the suspension of benefits and not a Rule 3.4 dismissal of the application.

iii) ***S. 44 IE Attendance***

[21] Finally, the respondent also submits that the applicant has not complied with s. 44 (failed to attend an IE) of the *Schedule* and the application ought to be dismissed. To start, my comments above regarding the importance of complying with Rule 15 equally apply here. The IE in question was scheduled June 21, 2018; therefore, the respondent had plenty of time to bring a proper motion seeking the appropriate relief prior to the start of this hearing. Moreover, my

[5] 2018 CanLII 76416 (ON LAT)

reading of to s.44, is that an insurer may require insurer's examinations by the health professionals of its choice, but this right is limited to those examinations that are "reasonably necessary".

[22] It has been the Tribunal's practice that issues of s. 44 non compliance are determined by way of a preliminary issue hearing with written submissions to determine if the IE was "reasonably necessary". This also makes practical sense and is more efficient as a bifurcated process prevents an unnecessary hearing from moving forward until this limited issue has been resolved. By way of example, in *18-002630 v Aviva General Insurance Company*,[6] a preliminary issue hearing was held on the very same issue.

[23] While s. 55(1) of the Schedule prohibits an insured person who fails to comply with a s. 44 IE from applying to the Tribunal, sections 55(2) and 55(3) allow the Tribunal to permit an applicant to proceed with their application despite the noncompliance and impose terms and conditions on such permission. In addition, and perhaps more importantly, this is not a case where the applicant did not attend the IE. The applicant's paralegal explains that the applicant, in fact, complied with the Notice of Examination and attended the IE. Therefore, on the very limited record before me including what exactly happened at the IE and whether another IE was or could have been scheduled, I fail to see how s. 44 has any application here. For those reasons the respondent's request for the application to be dismissed in accordance with s. 55 is denied.

[24] Finally, as stated above, before dismissing an appeal, Rule 3.5 provides that the Tribunal must give the parties notice of its intention to dismiss, provide the reasons for its intended decision to dismiss, and inform the parties of their right to make written submissions to the Tribunal within the time limits set out in the notice, which shall be at least 10 days. There is good reason behind Rule 3.5 as to dismiss a claimant's application is a serious remedy that should be used sparingly with utmost caution in unusual circumstances. In this motion, this rule has not formally been complied with. For all of these reasons, the respondent's motion is denied.

[25] I will now return to an analysis of the substantive issues in dispute as part of the in person hearing that was held over two days.

[6] 2019 CanLII 40237 (ON LAT)

ANALYSIS

Is F.E. entitled to an income replacement benefit?

[26] No. I find F.E. is not entitled to an income replacement benefit for the period in dispute, as he has not satisfied his onus to prove on a balance of probabilities of his entitlement and provide compelling evidence that he cannot perform the essential tasks of his employment.

[27] The insurer's obligation to pay IRBs, eligibility criteria and the method of calculating benefit amounts are set out in ss. 4-10 of the *Schedule*.

[28] Initial entitlement to an IRB falls under s. 5(1) of the *Schedule* for employed and self-employment persons: an IRB is payable if the insured was working at the time of the accident and, within 104 weeks of the accident, suffers a substantial inability to perform the essential tasks of that employment. Sections 6 and 7 of the *Schedule* address entitlement for IRBs for the period 104 weeks post accident. After the 104-week mark, the test changes: F.E. must suffer a complete inability to engage in any employment for which he is reasonably suited by education, training or experience as a result of the accident. This inquiry is divided into two steps: (1) what are the essential tasks of employment? and, (2) is the insured substantially unable to perform the essential tasks? The onus to prove entitlement rests with F.E.

F. E.'s non-compliance with Tribunal Orders

[29] As stated, F.E. has the onus to prove his case. Despite several orders from the Tribunal directing F.E. to produce certain documentation relevant to the issues in dispute, F.E. failed to do so. As well, F.E. undertook to provide various documents at an examination under oath that was conducted on March 7, 2018 related to this accident. Intact submits that I draw an adverse inference as a result.

[30] At the time of this hearing, F.E. has failed to provide several key documents: treatment records from Alexmuir Wellness; prescription records; bank records; work records from Uber; the clinical notes and records (CNRs) of Dr. Shaul, family doctor; and income tax returns/notice of assessments for 2018. No adequate explanation was provided by the applicant or applicant's counsel.

[31] I consider this documentation necessary to determine both entitlement to and quantum of an IRB. Most of this documentation is standard and regularly produced in an IRB claim such as this to allow an insurer to adequately assess

and adjust the file. How else can the amount of the IRB be calculated? Such documentation is especially imperative in this case when the applicant claims he is self-employed and calculating the weekly IRB may be difficult in the best of cases. The lack of evidence in support of his claim for IRBs and the applicant's testimony, which I found at times evasive in many areas and unnecessarily argumentative, failed to satisfy the evidentiary burden of proof.

[32] At the hearing, F.E. offered no adequate explanation as to why he did not comply with the production orders from the Tribunal of May 13, 2019 and September 9, 2019 for financial and employment documentation. I also note the September 9, 2019 Order, made on consent, required the parties to exchange the documents listed in the case conference orders of April 2 and May 13, 2019 no later than June 14, 2019.

[33] A consent production order means both parties agreed to its terms and to produce the documentation by a certain date. The Tribunal is committed to a fair, accessible and efficient hearing process that affords all parties an opportunity to present their case. Cooperation and goodwill amongst parties plays a crucial role in meeting these objectives.

[34] Here, I fail to see how the applicant's paralegal can argue that his interpretation of s.4(5) (how gross income is calculated) of the *Schedule* now allows him to maintain that the tax records no longer have to be produced; or how the CNRs from the physiotherapy centre who prepared the treatment plans and where the applicant completed his treatment are not relevant; or how updated CNRs from F.E.'s long time family doctor were should not be produced. Certainly, the applicant may argue that certain weight ought to be assigned to these records, but this information should have been produced as the Tribunal already made that determination regarding productions which the applicant consented to.

[35] Further, neither the applicant nor his paralegal explained why a plethora of undertakings from the examinations under oath were not honoured or why the applicant ignored the good-faith requests from Intact in various correspondence. I am cognizant of the fact that some of this documentation—especially as it relates to his self-employment with Uber—may not exist, or perhaps the tax returns may not have been filed, but F.E. does not offer any explanation, including any efforts taken to obtain this information or if alternative documentation (i.e. self employment records or bank records) may have sufficed. I am also cognizant that the Tribunal does not have an undertaking rule but the failure to comply with these undertakings (despite making clear acknowledgments under oath that F.E. would look and obtain certain relevant records – (i.e. Uber records regarding the

accident, CNRs) further demonstrates a consistent effort by the applicant to frustrate the adjudicative process and a near total disregard to cooperate with the insurer in the adjusting of his claim. This significantly compromised the applicant's case.

F.E.'s IRB initial entitlement

[36] By letter dated March 31, 2017, the respondent informed F.E. of his entitlement to an IRB in the amount of $400.00 per week on the basis of a OCF-3 Disability Certificate completed by Dr. Branko Millen, chiropractor, on March 10, 2017, listing F.E.'s injuries as low back pain, sprain and strain of lumbar spine, thoracic spine, sacroiliac joint, neck, headache and sleep disorder. Under the heading "Disability Tests and Information," Dr. Millen checked off the box that F.E. cannot return to work on modified duties and that that anticipated duration was "9-12 weeks."

[37] The March 31, 2017 letter from Intact also requested that the applicant provide an Employment Confirmation Form (OCF-2) and copies of employment pay stubs from 4 weeks pre-accident as well as post-accident. The OCF-2 signed by F.E. on May 24, 2017 confirmed that he was self-employed as an Uber driver at the time of the accident. The applicant also provided a tax summary for 2016 from Uber (work that he did and what he was paid) and bank account statements from January 29, 2016 -December 20, 2016 showing various deposits of income from Uber Canada. Notably, the employment details in Part 6 (i.e. start of employment and last day worked) and the salary information in Part 3 (i.e. time period to be used to calculate income) were left blank and it seems no updated or fully completed OCF-2 was ever provided.

[38] In 2017, in adjusting the file, Intact conducted a round of IEs to assess F.E.'s continuing entitlement to IRBs. It relied on two IE's—by a physician, Dr. D. Mula and a chiropractor, Dr. D. Leontidis —when it denied F.E.'s IRB entitlement as of October 23, 2017. F.E. submits that he meets the pre-104 week test based on the OCF-3, a report from Dr. Steiner, medical imaging and some other records. Intact argues that he has not provided evidence to satisfy his burden. I agree with Intact.

The evidence for continuing entitlement and reinstatement

[39] I must make a determination on the IRB issue in dispute based on the evidence put before me. The test for IRB under the *Schedule* requires F.E.to prove that he suffers a substantial or complete inability to perform the essential tasks of his self-employment. He has not satisfied this onus. On the evidence, I find the

medical and other evidence provided falls well short of F.E.'s burden to prove continuing entitlement to an IRB.

[40] The applicant testified that, immediately after the accident, he could not return to work because of pain in his lower back. He testified that, sometime in May 2017, he started working as driver at a company called Diacom Logistics, delivering parcels weighing 3-5 lbs. He apparently had another car accident in September 2017 and did return to this job after that time. In May or June 2018, he started working again as a driver at 'Ridex'. He testified that he did not work anywhere else after the March 2017 accident except for Diacom and Ridex. He currently works full time driving a truck Monday to Friday (8/9am – 4/5/6pm). Based on the applicant's testimony, I find as fact that the essential tasks of his employment as a truck driver were: sitting, operating truck; driving, planning and navigating.

[41] Overall, I found that there were significant discrepancies in the applicant's testimony. I found his testimony often to be evasive, lacked detail, and was inconsistent with no satisfactory explanation provided such that I had some concerns regarding the applicant's credibility. The applicant was, at times, indirect in many areas that I would expect him to have more consistency and recollection. He also questioned the relevance of fairly standard questions related to his employment to leave further uncertainty as to his wages. I did not accept the applicant's paralegal's explanation in final submissions that, somehow, F.E. had difficulty understanding questions and it was easy for him to be confused. Many questions were repeated, and I asked F.E. if he was able to understand English and he said that he did. He declined an interpreter even though English was not this first language. Likewise I also offered him several breaks during his testimony.

[42] In the end, I did not disregard F.E.'s testimony but, when faced with inconsistent evidence between the applicant's testimony and the documentary evidence, I preferred the documentary evidence. For example, in cross examination he was adamant that the accident happened on March 6, 2017 even though all of the records including hospital records pointed to March 8, 2017 as the correct date. He testified that he "blacked out" during the accident but the Emergency Department Record stated no loss of consciousness and that F.E. remembers all events. Similarly, the Ambulance Call Report also noted no loss of consciousness.

[43] The applicant also testified that he worked only at Diacom and Ridex after the accident. This was in direct contrast to Dr. W. Campbell's IE report completed on March 28, 2018, where she stated that F.E. reported to her that he did return to

work as an Uber driver during the first month post-accident (he reported to her being unable to recall when). Notably no Uber records for this time period were ever produced. He also reported to Dr. Campbell that he worked regularly for several weeks after the accident prior to stopping due to his back pain. He noted that there had been less work available due to increased competition amongst Uber drivers and he subsequently began working 3 days a week (8 hours a day) as a driver for Amazon (but did not return to this job following his September 2017 accident). At the hearing F. E. testified that when he met with Dr. Campbell, he was apparently told that she was there to help him get money from the insurance. He could not explain why this was said to him. I simply did not accept the applicant's evidence on this point as it had no air of reality. Dr. Campbell is a registered psychologist with the College of Psychologist of Ontario and completed hundreds of psychological assessments. Her credentials were not questioned. The evidence was that she met with the applicant for almost 2 hours on the first day and on a second day for psychological testing and prepared a very detailed and comprehensive 23-page report.

[44] At the hearing, F.E. did not know (or could not remember) Dr. Millen even though Dr. Millen completed his Disability Certificate and submitted several treatment plans of his behalf. He did not know Dr. L. Steiner, psychologist, who prepared a psychological report on his behalf and diagnosed him with PTSD. He did not remember Ginni Bajaj, who completed a treatment plan for physiotherapy and chiropractic treatment for him. The applicant was not certain when the last time he had treatment for his accident related injuries. He testified he was prescribed pain killers but did not know what specific medications he was taking. Over and over he would say: "I don't remember" or "I can't say yes I can't say no." I am cognizant that the applicant said in his testimony that after the accident he was having memory difficulties, but it was also conceded at the hearing that F.E. was never been diagnosed with any related memory problems.

[45] The applicant was the only witness to testify at this in person hearing. The applicant listed both his family doctor, Dr. R. Shaul and psychologist, Dr. Steiner, as witnesses to be called yet neither were called to testify. I did not make any negative inference from the applicant not calling these witnesses. However, F.E. did not produce any medical documentation addressing the essential tasks of his employment or how his impairments render him substantially unable to complete those tasks for the period in dispute, specifically.

[46] The applicant also relies on the Psychological Assessment Report of Dr. Steiner dated November 8, 2017. The stated purpose of this assessment was to determine the nature and extent to which F.E. is suffering from a psychological

difficulty as a result of the accident. Dr. Steiner diagnosed F.E. with PTSD, Major Depressive Disorder as well as Specific Phobia (driving related). I placed limited weight on Dr. Steiner's report for several reasons. First, the applicant testified that he did not know Dr. Steiner and was adamant he never met this doctor. He testified the only person at that Dr. Steiner's office was a lady and not a man. It also appears that this report was not entirely prepared by Dr. Steiner as part of the assessment was assigned to Lital Crombie (under the supervision of Dr. Steiner). Ms. Crombie, as a kinesiologist, was not a duly qualified health professional. I noted that the diagnostic impressions were rendered without any symptom validity testing. In the end, I was not certain if Dr. Steiner ever met with F.E. and what part of the report was prepared by him, if any, or Ms. Crombie. Dr. Steiner was never called to testify, nor was Ms. Crombie. As well, in preparing his report, it is apparent that Dr. Steiner did not review any medical records including any CNRs, imaging, or any of the IE reports aside from the OCF-3. Essentially, the entire report is reliant on F.E.'s self-reporting. Finally, although Dr. Steiner concludes that F.E. is unable to continue working following his accident due to cognitive, psychological and physical symptoms, he does not directly address what were the essential tasks of F.E.'s job and if he is substantially unable to perform those essential tasks.

[47] Ultimately, I prefer, accept and gave more weight to the reports of Dr. Mula and Dr. Leontidis, which are more persuasive, thorough and comprehensive. Dr. Mula was an expert in chronic pain and chronic pain management and commented directly on the IRB test. These reports further convince me that the claim for IRB should be dismissed. Dr. Mula, in his report dated October 10, 2017, concluded that F.E. does not "suffers a substantial inability to perform the essential tasks of his pre-accident employment as an Uber driver. Dr. Mula testified at the hearing in a candid and straightforward manner. Dr. Mula conducted a thorough physical examination which revealed a myofascial strain of the neck and bilateral shoulders and lumbar strain including tenderness to palpation at the areas of complaint, decreased mobility at neck, bilateral shoulders and lower back. However, F.E's strength and sensation were maintained and there was no evidence for bony or neurological injury from the accident. Notably, no chronic pain was diagnosed.

[48] During his testimony, Dr. Mula explained that the severity of F.E.'s pain complaints were simply not consistent with his objective findings. In cross examination, Dr. Mula conceded that his review of the x-ray imaging results revealed lucency at the odontoid (which could be artificial) and that a nondisplaced fracture was not excluded. Dr. Mula explained that x-rays have low resolution and he would consider recommending a CT scan, which he was never

asked to review. The IE report does not identify ongoing physical limitations. It notes that F.E. is independent in his self-care and personal hygiene and is able to walk and drive.

[49] The Functional Abilities Evaluation (FAE) dated October 10, 2017, completed by Dr. D. Leontidis, chiropractor, concluded that the results achieved are not considered to be a valid indication of his current functional abilities. Dr. Leontidis explained in his that F.E demonstrated an undetermined effort in this evaluation, and he reported pain which may have influenced his effort and reliability of results. It was noted that F.E. did not perform and complete most of the functional tests (crouching, kneel, climb stairs, reach etc.) due to self-reported inability and/or pain. Finally, Dr. Leontidis noted in his report that F.E. reported that he became employed on a full-time basis (10-12 hours per day; 4 days a week) as a driver for Amazon three months ago (ie. this would put it around June 2017).

[50] Overall, I find that F.E. has not provided enough evidence to conclude, on a balance of probabilities, that he suffers a substantial or complete inability to perform the essential tasks of his employment as a result of the 2017 accident. There was also evidence that he had returned to work following the accident and was even working for Uber.

Medical and Rehabilitation Benefits[7]

[51] Sections 14, 15 and 16 of the *Schedule* provide that an insurer is only liable to pay for medical and rehabilitation expenses that are reasonable and necessary as a result of the accident. The applicant bears the onus of proving on a balance of probabilities that the treatment plans in dispute are reasonable and necessary.

[52] The applicant claims entitlement to three medical/rehabilitation benefits. I find F.E. is not entitled to the here treatment plans as they are not reasonable and necessary.

[53] I shall briefly address the following three treatment plans for psychological, chiropractic and physiotherapy together.

[7] . At the hearing, both parties confirmed that the applicant has been removed from the minor injury guideline. Therefore, it was not necessary for me to determine if the applicant's injuries are predominantly minor as defined in the Schedule.

1. *$3,153.76 for psychological treatment recommended by Dr. Leon Steiner in a treatment plan submitted January 8, 2018, denied by the respondent on January 8, 2018.*

2. *$3,308.96 for chiropractic treatment recommended by Dr. Branko Millen in a treatment plan submitted May 11, 2018, denied by the respondent on May 23, 2018.*

3. *$4,089.60 for physiotherapy and chiropractic treatment recommended by Ginni Bajaj in a treatment plan submitted October 12, 2017, denied by the respondent on October 26, 2018.*

[54] I was not entirely certain why the applicant believed that these plans were reasonable and necessary. The applicant chose not to introduce any evidence at the hearing from the proposed treatment providers in support of the OCF-18s (aside from Dr. Steiner very generally recommending 16 sessions of therapy in his psychological report). As well, the applicant testified that he did not know or could not remember Dr. Millen, Dr. Steiner or Ginni Bajaj—all of whom prepared the three treatment plans in dispute. I had real concerns if the applicant ever met with these treatment providers to adequately assess the treatment being recommended and why. The applicant's final submissions lacked any analysis of how the claimed treatment plans were reasonable and necessary to address F.E.'s alleged injuries. The applicant's paralegal did not direct me to specific medical evidence to support any of his claims. I found nothing persuasive in his appended documentation to assist me.

[55] In contrast, Intact provided evidence that all of its denials were based on medical evidence and reports from its own assessor. For example, F.E. was seen by Dr. M. Khaled, physician, on June 21, 2018, in regard to the disputed treatment plans. When F.E. attended for this examination, he advised Dr. Khalid that he was feeling fine and no longer had any accident symptoms and that he did not wish to pursue any further treatment or go through with the scheduled assessment. There was also evidence directly from the applicant at the hearing that the treatment from Alexmuir Wellness Centre was not helping. There was no evidence any of the plans had been incurred.

[56] Accordingly, I find F.E. is not entitled to payment for these three treatment plans as they are not reasonable and necessary.

Cost of Examinations

[57] The applicant claims entitlement to two assessments as follows:

1. $1,850 for an attendant care needs assessment recommended by Dr. Branko Millen in a treatment plan submitted May 22, 2017, denied by the respondent on May 31, 2017?

2. $2,125.00 for a psychological assessment recommended by Dr. Leon Steiner in a treatment plan submitted August 14, 2017, denied by the respondent on August 24, 2017?

[58] Again, the applicant's evidence and final submissions lacked any analysis of how the claimed assessments were reasonable and necessary to address F.E.'s alleged injuries. The evidence before me was that F.E. did not request any psychological treatment following the accident and that F.E. had returned to work full time and was able to manage his self care needs.

[59] With respect to the amount of $2,125.00 for a psychological assessment, the respondent denied this proposed treatment based on the Psychological Report of Dr. Campbell dated March 28, 2018, who concluded that there was no objectively diagnosable psychological condition or a clinically significant psychological impairment in relation to the accident. Overall, Dr. Campbell found that this treatment plan was not reasonable and necessary. Remarkably, as I found during this hearing, Dr. Campbell also noted that during her assessment F.E. questioned the relevance of certain innocuous questions and refused to discuss his employment. She described in her report that F.E. did not present as straightforward and provided contradictory information.

[60] With respect to the amount of $1,850.00 proposing an assessment of attendant care needs, the respondent denied this proposed treatment based on Dr. Mula's report dated May 15, 2017, which found the proposed services (documentation, support activity for claim form) are not medically reasonable and necessary as there is no compelling evidence to support attendant care assistance at this juncture. An Addendum Report dated June 21, 2017 completed to consider additional imaging results did not change Dr. Mula's opinion.

[61] Accordingly, I am unable to look beyond the IE assessments and find F.E. is not entitled to payment for these two costs of assessments as they are not reasonable and necessary.

Interest

[62] Section 51 of the *Schedule* sets out the criteria for assessing and awarding interest on overdue payments.

[63] There being no overdue benefits payments, no interest is payable.

Misc.

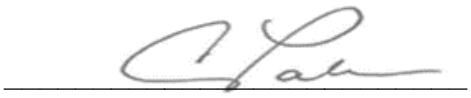
[64] In final submissions, the applicant's paralegal asked that I draw an adverse inference against the respondent for failing to call Dr. Leontidis or Dr. Campbell. I find that this is not an appropriate situation to draw an adverse inference against the respondent. The respondent's counsel was able to explain that he advised applicant's paralegal that he would not be calling these witnesses and merely relying on their reports. I note that once the applicant was made aware that these witnesses would not being called, he was free to call or summons any of the respondent's witnesses but declined and only raised an objection after his case was closed and all witnesses called. I reiterate that the applicant also did not call all of their listed witnesses and likewise did not draw an adverse inference against the applicant. For all of these reasons, I decline to draw an adverse inference from the respondent's failure to call their listed witnesses in the Order.

CONCLUSION/ORDER

[65] For these reasons, F.E. has not proven his entitlement to any of the benefits he claims.

[66] There are no overdue benefits payments and accordingly no interest payable.

Released: March 25, 2020



Cezary Paluch
Adjudicator