Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

Citation: Katsiashvili v. Economical Mutual Insurance Company, 2023 ONLAT 21-015596/AABS

Licence Appeal Tribunal File Number: 21-015596/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:

Merab Katsiashvili

Applicant

and

Economical Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Terry Prowse**

APPEARANCES:

For the Applicant: Merab Katsiashvili, Applicant
Jenny Babayev, Paralegal

For the Respondent: Rovina Sehdev, AB Specialist
Kyle McNerney, Counsel

HEARD: by Videoconference: April 11, 2023

OVERVIEW

[1] Merab Katsiashvili, the applicant, was the driver of an automobile that was involved in an accident on July 23, 2020. He applied for accident benefits, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)*. The respondent, Economical Mutual Insurance Company, denied the benefits, so the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are as follows:

i. Are the applicant's injuries predominately minor as defined in s.3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit in the Minor Injury Guideline ("MIG")?

ii. Is the applicant entitled to a non-earner benefit of $185.00 per week from January 5, 2021 to July 23, 2022?

iii. Is the applicant entitled to $1,342.81 for chiropractic services, proposed by Polyclinic Rehabilitation Centre in an OCF-18 ("treatment plan") dated January 29, 2021?

iv. Is the applicant entitled to $2,000.00 for a TMJ Assessment, proposed by Toronto Medical Centre in a treatment plan dated March 3, 2021?

v. Is the applicant entitled to $1,308.08 for chiropractic services, proposed by Toronto Medical Centre in a treatment plan dated March 2, 2021?

vi. Is the applicant entitled to $1,995.32 for a Psychological Assessment, proposed by Toronto Medical Centre in a treatment plan dated March 31, 2021?

vii. Is the applicant entitled to $1,748.00 for a Biopsychological Assessment, proposed by Toronto Medical Centre in a treatment plan dated March 17, 2021?

viii. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

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

RESULT

[3] The applicant's injuries are predominately minor as defined in s.3 of the *Schedule* and therefore subject to treatment within the $3,500.00 limit in the MIG.

[4] The applicant is not entitled to any of the benefits in dispute.

[5] The applicant is not entitled to interest or an award.

PROCEDURAL ISSUES

[6] During a case conference on October 18, 2022, the parties consented to four witnesses each. At the start of the hearing, the applicant announced that he would not be calling witnesses and would not be testifying himself. With no witness testimony to challenge, the respondent decided that its witnesses were no longer required.

[7] With no witnesses to call, the parties consented to presenting the Tribunal with general statements, followed by closing statements related to the disputed issues, the parties' evidence, and positions. I noted for the parties that combined, they had submitted over 2000 pages in their document brief. I asked them to highlight, for the Tribunal, the evidence that they were specifically relying on to meet the legal tests.

[8] The hearing concluded on the first day.

ANALYSIS

[9] It is important to note that although the respondent accepts that the applicant was involved in an accident on July 23, 2020, it has consistently challenged the veracity of several aspects of his claim. This has included the circumstances leading up to the accident, whether the applicant sustained any injuries during it, and the applicant's claim that alleged injuries caused a complete inability for him to carry on a normal life. From my understanding, to date , the respondent has not paid for any medical/rehabilitation treatment from the MIG.

The applicant's injuries are predominantly minor

[10] I find that the applicant has not shown that his injuries are more than minor injuries, as defined in s. 3 of the *Schedule,* and he is therefore subject to treatment within the $3,500.00 MIG limit.

[11] Section 18(1) of the *Schedule* provides that medical and rehabilitation benefits are limited to $3,500.00 if the insured sustains impairments that are predominantly a minor injury. Section 3(1) defines a “minor injury” 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.”

[12] An insured may be removed from the MIG if they can establish that their accident-related injuries fall outside of the MIG or, under s. 18(2), that they have a documented pre-existing injury or condition combined with compelling medical evidence stating that the condition precludes recovery if they are kept within the confines of the MIG. The Tribunal has also determined that chronic pain with functional impairment or a psychological condition may warrant removal from the MIG. In all cases, the burden of proof lies with the applicant.

[13] The applicant submits that he should be removed from the MIG for three reasons. The first relates to direct injuries he sustained to his back, knee, and rotator cuff during the accident. The second relates to having chronic pain, from multiple body locations. The third relates to psychological impairments that assessing mental health professionals attributed to the accident.

[14] The applicant relies on the July 27, 2020 clinical notes and records of Dr. Aneesha Bakshi, family physician at MCI The Doctor's Office walk-in clinic, to show that he complained of injuries within days of the accident, and clinical notes and records from the following spring, when he made similar complaints. The applicant also relies on a February 3, 2023 report by Dr. Syed Rizvi, psychiatrist, who diagnosed him with depression and anxiety secondary to the accident. The applicant declined to testify.

[15] The respondent denies that the applicant sustained or developed any physical or psychological injuries that would remove him from the MIG. It points to the accident report by P.C. Farshad Daryaram and the applicant’s own medical evidence following the accident as proof that the applicant did not sustain any direct injuries, beyond minor injuries, in the accident. It notes that the applicant’s medical documentation contains no evidence or diagnoses of chronic pain to speak of. The respondent asks the Tribunal to afford no weight to the psychiatric report of Dr. Syed Rizvi, submitting that his conclusion that the accident was the cause of his impairments was based on inaccurate information provided by the applicant. The respondent also contends that Dr. Rizvi’s report was too far removed from the date of the accident to provide a reliable causal connection.

[16] I find that the applicant has not established that he sustained injuries as a result of the July 23, 2020 accident for the following reasons:

i. During an interview on October 10, 2021, P.C. Daryaram, the investigating officer, specifically recalled that the airbags of the applicant's vehicle did not deploy, and the occupants had no injuries – it was property damage only;

ii. The applicant did not feel a need to attend hospital; a fact that supports the officer's observation;

iii. It was not for another four days, on July 27, 2020, that the applicant attended MCI The Doctors' Office walk-in clinic. He complained of headaches and pain in his right knee and foot which are, by definition, minor injuries. Dr. Aneesha Bakshi, family physician, performed a detailed physical examination, with largely normal findings. She also wrote that X-rays showed no cause for the applicant's reported pain in his right knee, and the soft tissues of his right foot appeared normal;

iv. Dr. Bob Grossman, chiropractor, completed a Disability Certificate (OCF-3) on November 11, 2020, still listing only headaches and sprains/strains of the applicant's spine, right shoulder, right knee and right ankle/foot, as injuries from the accident; and

v. Apart from records in late 2020 and early 2021 dealing with the applicant undergoing chiropractic treatments and physiotherapy for, again, minor injuries, there is no evidence of him complaining of accident-related symptoms or attending medical facilities for another nine months, in April 2021.

[17] There is no evidence of the applicant suffering from chronic pain because of this accident. During oral submissions, he appeared to suggest that he suffered from chronic pain because of ongoing pain with his rotator cuff, back and knee. Respectfully, complaints of pain in one body part, or several concurrently, are not reliable bases, in themselves, for credibly concluding that one suffers from chronic pain. If the applicant was qualified to make such a diagnosis, which he is not, the Tribunal would still need evidence, at a minimum, that the pain he complains of is due to injuries he sustained in the subject accident, that it is persistent and, importantly, that the pain causes him to have functional impairment. No such evidence was offered. The applicant did not undergo a chronic pain assessment, and there are no applicable diagnoses of same by a qualified medical practitioner.

[18] There is also no reliable support for the applicant's claim that he suffers from mental health issues because of the accident. Dr. Syed Rizvi, psychologist, made such a causal connection following a brief, 30-minute consultation visit with the applicant, on February 3, 2023, or more than 2 -1/2 years after the accident. The doctor did not list any accident or medical records that he reviewed, and he performed no psychometric testing in arriving at this diagnosis. The very brief report lacked any basis for how Dr. Rizvi concluded that the 2020 accident was causal, when he wrote: "…depression and anxiety secondary to motor vehicle accident". He appears to have made this determination solely on the applicant's reporting. I find Dr. Rizvi's report is not objective, is not sufficiently detailed, and is unreliable on the question of causation.

[19] Accordingly, I find the applicant has failed to demonstrate that he sustained physical or psychological injuries as a result of the July 23, 2020 accident that require treatment beyond the MIG limit.

Medical/Rehabilitation Treatment Plans

[20] To receive payment for a treatment and assessment plan under sections 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating, on a balance of probabilities, that the benefit is reasonable and necessary, and a result of the accident. To do so, the applicant should identify the goals of treatment, how the goals would be met to a reasonable degree and that the overall costs of achieving them are reasonable.

[21] While I have found that the applicant is in the MIG, again, my understanding is that the respondent denied all medical/rehabilitation claims that he submitted. In that case, there should be $3,500.00 remaining for medical and/or rehabilitative services if they are deemed reasonable and necessary.

The applicant has failed to establish entitlement to $1,342.81 for chiropractic services

[22] Neither party specifically dealt with the issue during oral submissions or provided a treatment plan. After reviewing the application, I note that the applicant did not describe the issue as arising from the denial of a treatment plan, but due to the denial of an invoice for services rendered.

[23] Notwithstanding, without more information, it is impossible to determine precisely what accident-related injury the treatment was intended to resolve, how that would be accomplished and if the recommended treatment was a reasonable and necessary method to do so.

[24] Given that the applicant has the onus to provide evidence to support his claim, I conclude that he has failed to do so and is therefore not entitled to payment of this benefit.

The applicant has failed to establish entitlement to $2,000.00 for a TMJ assessment

[25] The applicant claims that he developed a TMJ disorder because of the accident. He states that the issue was diagnosed by Dr. Leon Treger, dentist, in a treatment plan dated March 3, 2021.

[26] The respondent denies that the applicant sustained a TMJ disorder because of the accident. It contends he made no previous, related complaints to be able to attribute the condition to it.

[27] Contrary to the applicant's statement, the treatment plan is not a clinical diagnosis of a TMJ disorder. It is a form that the doctor completed to help determine if that was the case. Nevertheless, for the assessment to be considered reasonable and necessary, Dr. Treger would still have required information that led him to suspect that the applicant had a TMJ disorder and to suspect that it was due to the accident. No such information was available because there was simply no prior information that remotely tied a TMJ disorder to the July 2020 accident. The applicant could have testified as to when and how the condition manifested, but again, chose not to, and there is no corroborating medical documentation to support the same.

[28] The applicant failed to establish that the treatment plan is reasonable or necessary.

The applicant has failed to establish entitlement to $1,308.08 for chiropractic services

[29] The applicant did not provide oral submissions related to the treatment plan. His document brief includes the March 2, 2021 treatment plan that was completed by Dr. Mir-Reza Nabavi, chiropractor. Dr. Nabavi recommended treatment under the MIG.

[30] The respondent disagrees that the treatment plan is reasonable and necessary. It points to information in the document that was provided by Dr. Nabavi that is inconsistent with the medical records.

[31] I agree with the respondent. My first concern with the treatment plan is that it does not specify what injury Dr. Nabavi intended for it to resolve. From its

contents, I am uncertain if Dr. Nabavi had an accurate picture of what transpired during the accident and what injuries and sequelae were a direct result of it. Dr. Nabavi listed no fewer than 36 medical/psychological issues that arose from the subject accident. These included the sprains/strains already discussed, but also included contusions, superficial injuries, a TMJ disorder and various psychological injuries, including PTSD, which had never been tied to the accident.

[32] When identifying barriers to recovery, he wrote, “accident was severe, body direct trauma to both wrists, head and right knee, cognitive injuries such as memory, focus and orientation; deconditioning; jaw pain; no job; language difficulty; post traumatic stress; prior accident in 2017; prior back pain and headache since MVC in 2017; sleep disturbances and nervousness; Early onset of symptoms, multiple symptoms, severity of symptoms”. Several of these “barriers” were injuries that were never mentioned around the period of the accident and are without formal diagnoses.

[33] The treatment plan is not reasonable because it is clearly based on incorrect information related to the accident, including the injuries sustained as a result of it. I am uncertain, therefore, what the training plan was intended to achieve, or how it applies to this claim.

The applicant has failed to establish entitlement to $1,995.32 for a psychological assessment, or to $1,748.00 for a biopsychological assessment.

[34] The applicant’s oral submissions simply centred around there being diagnoses of psychological issues which required further investigation, making the treatment plan reasonable and necessary.

[35] The respondent disagrees that the applicant sustained any psychological issues because of the subject accident. It points to the accident and early medical records following it to show that the applicant did not sustain any injuries that would have given rise to a psychological injury. It points to the periods before and following the accident, where there are no psychological complaints by the applicant to a treating practitioner. Further, it points to remarks that the service providers attributed to the applicant to support their recommendations for assessment recommendations, which were inconsistent with what the accident/medical records showed and supported.

[36] The path to entitlement for an assessment is not an onerous one. But it still requires an objective analysis of available medical records, that support and lead

the service provider to at least suspect that an accident was the cause of claimed injuries. I cannot see where/if that occurred.

[37] If the service providers, Maryum Khokhar, psychotherapist and Svetlana Gabidulina, psychologist, had reviewed the accident and early medical records, they would have known that the applicant sustained only minor physical injuries, if any, during the motor vehicle accident. They would also have been aware that he had not complained of a single related psychiatric symptom at the time of the accident, or for another several months when he was attempting to advance his claim. The service providers would have also known that his statements of what occurred during the accident were entirely inconsistent with the accident/medical records, such as him hitting his head and being unconscious for a period.

[38] Ultimately, that information was available to the providers, if they had taken the time to consider it. They should have challenged the applicant with the inconsistencies before relying on his word alone and recommending a psychological assessment at their facility. They did not.

[39] I find there was no valid basis for the service providers to suspect that the applicant sustained a psychological injury during the accident. As such, the treatment plans were not reasonable or necessary.

The applicant is not entitled to a non-earner benefit

[40] Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of an accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. Section 3(7)(a) defines a “complete inability to carry on a normal life” as “an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.” The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mut. Ins. Co., 2009 ONCA 391*, which, generally, focuses on a comparison of the applicant’s pre- and post-accident activities.

[41] The applicant seeks a non-earner benefit of $185.00 per week, for the period January 5, 2021 to July 23, 2022. He made no oral submissions related to how the accident impacted his ability to carry on a normal life. He did not testify. Related documentation that he relies on includes two OCF-3s, an Activities of Normal Life questionnaire that he signed on April 24, 2021, and the transcript of an examination under oath that he underwent on June 4, 2021.

[42] The respondent denies that the applicant sustained any injuries in the accident, let alone any severe enough to cause a complete inability to carry on a normal life. It points to the initial accident/medical records as proof that the applicant did not sustain any significant injuries in the accident. It also points to previous statements by the applicant that contradict the notion that he was as functionally incapable as he now claims.

[43] Apart from forms that the applicant completed himself, such as the Activities of Normal Life questionnaire, he provided no corroborating evidence of his pre-accident activities. I am therefore unable to adequately compare his pre- and post-accident functioning, as described in *Heath*, to determine the degree, if any, of his functional losses. Notwithstanding this omission, even if the applicant had provided sufficient pre-accident information of his daily activities, his claim would still fail due to evidence that contradicts his claim.

[44] For example, a November 11, 2020 OCF-3 completed by Bob Grossman, chiropractor, is not a credible indicator that the applicant was incapable of performing any tasks. Although Mr. Grossman checked the box to indicate that was the case, he immediately qualified it with "Suffers from functional impairments which impact <u>some</u> of his daily living activities" [my emphasis]. The chiropractor's own statement contradicted what he had just indicated.

[45] The applicant's document brief contains a second OCF-3, completed by Dr. Mir-Reza Nabavi, chiropractor, on March 2, 2021. That document is also not credible where Dr. Nabavi likewise indicates that the applicant had a complete inability to carry on a normal life, but then qualifies that with, "Activities involving sitting, standing, walking, bending, twisting, lifting, overhead reaching and pulling and pushing <u>aggravate his symptoms</u>" [my emphasis]. Again, the statement does not support the notion that the applicant suffered from a complete inability to carry out any tasks that he normally would have been able to perform before the accident.

[46] The applicant's indications that he could not perform the remainder of the listed activities are unsupported by the medical evidence and by his own statements. He completed a Statutory Declaration and an Activities of Daily questionnaire, on April 24, 2021, indicating that he could partially perform all activities related to personal care and functional abilities. He also indicated that he could partially drive/ride in a vehicle, keep track of conversations and communicate by writing. He further indicated that he could perform several physical activities and most cognitive activities, with help. During the examination under oath six weeks later, he confirmed that he was working before the accident and was still working, but

with less hours. When asked to confirm his workplace tasks, as a window installation subcontractor, the applicant stated, the following:

i. "…And actually I'm just in this work in the capacity of a supervisor. Actually, this manual job is performed by the helpers. I simply watch them and instruct what to do."

[47] I am unable to adequately compare the applicant's pre- and post-accident functioning because the applicant did not provide sufficient evidence of his pre-accident life for me to do so. His decision not to testify also made it difficult for him to meet the *Heath* test, as the Tribunal does not have a comparison of his pre- and post-accident activities. Nevertheless, based on the evidence before me, I find the evidence shows that the applicant could perform most, if not all his tasks after the accident, to some degree. He has therefore failed to demonstrate entitlement to an NEB.

Interest

[48] Interest applies on the payment of any overdue benefits, pursuant to s. 51 of the *Schedule*. Given that no benefits are owed to the applicant, it follows that no interest is payable.

Award

[49] The Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. In this case, an award is not warranted because, again, no benefits are payable.

ORDER

[50] I find the following:

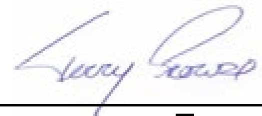
i. The applicant's injuries are predominately minor, as defined in s.3 of the *Schedule*;

ii. The applicant is not entitled to an NEB;

iii. The applicant is not entitled to any of the disputed treatment plans, or interest; and

iv. The respondent is not liable to pay an award.

Released: November 23, 2023



Terry Prowse
Adjudicator