Citation: Tse v. Economical Insurance Company, 2024 ONLAT 22-001701/AABS

Licence Appeal Tribunal File Number: 22-001701/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:

Ling Tse

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Harry Adamidis**

APPEARANCES:

For the Applicant: Daniaal Sibtain, Counsel

For the Respondent: Karly Lyons, Counsel

HEARD: **By written submissions**

OVERVIEW

[1] Ling Tse, the applicant, was involved in an automobile accident on June 8, 2020, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by the respondent, Economical Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

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

ii. Is the applicant entitled to a non-earner benefit of $185.00 per week from July 7, 2020 to June 8, 2022?

iii. Is the applicant entitled to $211.94 for medication, submitted on a claim form (OCF-6) dated September 25, 2020?

iv. Is the applicant entitled to $221.37 for medication, submitted on a claim form (OCF-6) dated April 20, 2021?

v. Is the applicant entitled to $168.83 for medication, submitted on a claim form (OCF-6) dated November 16, 2021?

vi. Is the applicant entitled to $41.98 for medication, submitted on a claim form (OCF-6) dated November 29, 2021?

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

RESULT

[3] The applicant's injuries predominantly minor as defined in s. 3 of the *Schedule* and subject to treatment within the MIG.

[4] The applicant is not entitled to a non-earner benefit.

[5] The applicant is not entitled to the treatment plans, nor interest.

ANALYSIS

Minor Injury Guideline (MIG)

[6] The applicant's injuries are predominantly minor as defined by s. 3 of the Schedule.

[7] 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."

[8] 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.

[9] The applicant submits that she has been diagnosed with a concussion. She further submits that she has reported neck, back, and shoulder pain to her family doctor since the accident. The long term nature of these complaints establishes that she has chronic pain which is not treatable within MIG limits. There is also evidence of degenerative changes to her cervical and lumbar spine that are likely pre-existing. This also takes her out of the MIG. As well, the applicant's psychological impairments are a third reason to remove her from the MIG.

[10] The respondent submits that the applicant sustained soft tissue injuries as defined by the MIG and there is no reliable evidence of a concussion. The applicant's family doctor records are skeletal and largely illegible and should be given no weight. In regard to her psychological condition, the applicant has not been diagnosed with a mental health disorder. Finally, the applicant has provided no evidence of a pre-existing condition and she has not explained how mild degenerative changes preclude maximal recovery under the MIG. As such, she has not provided compelling medical information to support the premise that she should be removed from the MIG.

Concussion

[11] The applicant submits that Dr. Hugo Law, the applicant's family doctor, diagnosed her with a concussion. This is shown in his clinical notes dated July 2, 2020. As a result of this diagnosis, he prescribed vimovo and baclofen.

[12] I note that a concussion injury takes one out of the MIG.

[13] The clinical note of July 2, 2020 appears to state "concussion" followed by a right pointing arrow, and then followed by "vimovo." The remaining words in that section are illegible.

[14] In my view, the clinical notes are mostly illegible and do not provide a clear indication of a concussion diagnosis. If Dr. Law did diagnose the applicant then further explanation would be required to give weight to his opinion. This is because the hospital record from the date of the accident indicates that the applicant denied having a head injury and that she reported not losing consciousness. As such, I find, on a balance of probabilities, that the applicant did not sustain a concussion in the accident because there is no evidence of a head strike in the hospital records and Dr. Law's notes provide no explanation as to why he diagnosed the applicant with a concussion.

Chronic Pain

[15] The clinical notes and records of Dr. Law are difficult to read. Most of the words are either illegible or partially legible and require the reader to guess what has been written. Little weight can be given to this evidence as it cannot be understood.

[16] The insurer's examination (IE) of Dr. Howard Platnick, family physician, dated November 23, 2020, was undertaken to assess the applicant's entitlement to the non-earner benefit (NEB). He conducted a physical examination after which he diagnosed her with cervical myofascial strain WAD II and lumbosacral myofascial strain. Both are sprain and strain type injuries that are within the MIG.

[17] Dr. Platnick notes that the applicant reported neck and back pain. She reported tenderness with palpitation over the upper fibres of the right more so than the left trapezius muscle region and the right paralumbar region. However, he also notes that there was no hypertonicity, muscle spasm, wasting or guarding along the spine.

[18] Dr. Platnick observed that the applicant was guarded and self limiting during testing and exhibited a better range of motion in the neck and lumbosacral spine

when she was not being tested. This lead him to conclude that her reported neck and back limitations are subjective.

[19] Dr. Platnick opines that during the physical examination there were no valid or reproducible signs to support ongoing accident-related injury or impairment of the musculoskeletal, neurological or orthopaedic systems that would cause any limitation or restriction. Moreover, no injury or impairment was identified that would prevent her from achieving full recovery from her accident-related injuries.

[20] The applicant argues that no weight should be given to this IE because it was not created for the purpose of a MIG analysis. I disagree. Evidence is relevant if it speaks to the issue being decided. The IE report addresses the applicant's accident-related pain and musculoskeletal injuries. This makes it relevant to an assessment of chronic pain.

[21] The applicant's prescription history shows that Dr. Law continued to prescribe Celebrex and Gabapentin in 2022. This suggests that the applicant continued to make pain complaints to her family doctor. Even so, these prescription summaries do not constitute compelling medical evidence. This is because there are no legible clinical notes and records to provide insight into the reasons and circumstances for these prescriptions.

[22] I find the report of Dr. Platnick to be persuasive. He physically examined the applicant and diagnosed her with sprain and strain injuries. He also determined that the pain the applicant continues to experience is linked to her sprain and strain injuries within the MIG, and that no injuries were identified that would prevent her from achieving a full recovery. For these reasons, I find that the applicant does not have chronic pain.

Pre-existing condition

[23] According to the applicant, there is evidence of degenerative changes in her cervical and lumbar spine which are likely pre-existing and take her out of the MIG. She points to an imaging report dated June 10, 2020 which states that there is "very mild degenerative marginal lipping throughout the lumbar spine."

[24] The applicant makes no submissions on how her pre-existing condition precludes recovery if she is kept within the MIG. Consequently, the applicant has provided no basis to find that she can be taken out of the MIG based on this pre-existing condition.

Psychological Condition

[25] According to the applicant, Dr. Law notes that she suffers from insomnia and constant worrying. She also submits that Dr. Law prescribed an antidepressant trazadone. Ms. Jeena J Abraham, occupational therapist, in her IE dated November 23, 2020 notes that post-accident that the applicant reports getting easily irritated and has become short tempered. The IEs of Dr. Platnick and Ms. Abraham both document that the applicant reports feeling anxiety as a passenger and that she stopped driving after the accident. According to the applicant, her symptoms show that she sustained psychological injuries from the accident.

[26] The pages referenced by the applicant in Dr. Law's notes are not legible. It is unclear if his notes state that she suffers from insomnia, or constant worrying. The applicant's prescription summary shows that that Dr. Law prescribed a total of 30 tablets of the anti-depressant trazadone in May, 2021.

[27] The IEs document the applicant reporting that she stopped driving after the accident, but for different reasons. In Dr. Plotnick's report the applicant states that she does not drive because she is scared. In Ms. Abraham's report, the applicant states that she does not drive because she has no car and other people drive her as needed. There is no mention of driving anxiety. As such, the applicant provided two different reasons for not driving to two different assessors. In my view, this is an unexplained inconsistency and there is no clear indication that she has driving anxiety.

[28] The applicant's family doctor prescribed an anti-depressant on one occasion about a year after the accident. The applicant has also described feeling anxious as a passenger, and becoming short tempered and easily aggravated post-accident. She told one assessor that she is scared to drive, but told another assessor that she does not drive because she has no car. I further note that the applicant has not been diagnosed with a psychological condition. This evidence shows that the accident may have had some psychological impact. However, this evidence is not sufficient enough to show that she sustained a psychological injury or impairment as a result of the accident.

[29] Having found that the applicant does not have chronic pain, a pre-existing condition that precludes recovery, nor a psychological condition as a result of the accident, I further find that the applicant has not established, on a balance of probabilities, that removal from the MIG is warranted.

Non-Earner Benefit (NEB)

[30] The applicant is not entitled to a non-earner benefit.

[31] Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the 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.

[32] The applicant submits that prior to the accident she was fully independent with personal care, housekeeping, and activities of daily living. She assisted her in-laws by taking them to medical appointments and household tasks. She also participated in a volleyball league and was part of a dance team that occasionally performed in front of audiences. The accident caused her ongoing pain in the neck, back, shoulders, and elbows. She now has headaches and dizziness. Due to these impairments she is completely unable to engage in the majority of her pre-accident activities. Her limitations are documented in a statutory declaration dated August 4, 2020. Many of the same limitations are also documented in both IEs and the treatment records of Times Physio. According to the applicant, she is entitled to an NEB from July 7, 2020 to June 8, 2022.

[33] The respondent submits the applicant's statutory declaration is not supported by medical evidence. In particular, the clinical notes and records of Times Physio show that the applicant had no functional restrictions when she was discharged on October 20, 2020. The IE of Ms. Abraham indicates that the applicant can manage all previous self-care activities, most housekeeping activities, and that she cannot engage in some activities due to Covid-19 restrictions. According to the respondent, the applicant has not established her entitlement to an NEB.

[34] The clinical notes and records of Times Physio are difficult to read and understand. For this reason, I give no weight to this evidence.

[35] In her statutory declaration, the applicant indicated that after the accident her functioning became limited. She was still able to pick up mail, make simple snacks, re-heat food, shower on her own, go to the bathroom on her own, get out of bed and dress herself, feed herself, and also read and write. However, she

can no longer sit or stand for long periods of time. It became too painful for her to complete household chores like cleaning her house, laundry, mopping, or vacuuming or outdoor chores like mowing the lawn or watering the grass. She was no longer able to dance or play volleyball. She was also unable to drive or be near a car because it scared her. She was no longer able to care for her in-laws by taking them to appointments or helping them with housekeeping or errands.

[36] Three months later, the applicant reported to Ms. Abraham that she manages all of her self-care activities, is able to do some light cooking in hot pot, light dish washing and water a few indoor plants, can tidy small areas and do light sweeping. The applicant stated that her spouse and daughter assist with other home making chores.

[37] Ms. Abraham conducted in-person range of motion testing. She determined that the applicant had a functional range of motion elbows, wrists, hips, knees, ankles, and shoulders. There was a mild restriction in extending her right shoulder. Her cervical and lumbar spine were within functional limits, with a mildly restricted lumbar flexion.

[38] Ms. Abraham opines that the applicant is not able to lift or carry heavy items. However, she is able to independently complete self-care activities, light cooking, and light housekeeping duties. In her view, the applicant does not meet the "complete inability to carry on a normal life" test for a NEB.

[39] Likewise, Dr. Platnick also noted that the applicant reported no longer being able to complete heavier housekeeping duties due to neck and back pain and that she no longer participated in volleyball or dancing. Even so, the applicant was able to do light sweeping, wiping counters, cook simple meals, light dish washing, and tidy up. Dr. Platnick concludes that no accident-related injury or impairment was identified that would cause the applicant to suffer a complete inability to carry on a normal life.

[40] The evidence in the statutory declaration and the two IEs is consistent. The applicant's functional abilities decreased after the accident. She cannot perform more demanding household tasks like vacuuming, mopping, or mowing the lawn. However, she is independent with her self-care and can still perform light house keeping tasks. Moreover, testing in both IEs shows that her range of motion is either functional or moderately restricted. In my view, this level of functioning precludes her from meeting "the complete inability to carry on a normal life" test. For this reason, I find that she is not entitled to an NEB.

Treatment Plans and Interest

[41] As I have found the applicant's injuries fall within the MIG, it is unnecessary to determine whether the claimed treatment plans are reasonable and necessary. The applicant is not entitled to treatment beyond the $3,500 MIG limit.

[42] Interest is not payable as there are no overdue amounts owing.

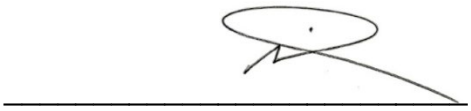
ORDER

[43] The applicant's injuries predominantly minor as defined in s. 3 of the Schedule and subject to treatment within the MIG.

[44] The applicant is not entitled to a non-earner benefit.

[45] The applicant is not entitled to the treatment plans, nor interest.

Released: January 11, 2024



Harry Adamidis
Adjudicator