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: M.A. vs. Unifund Assurance Company, 2020 ONLAT 19-000209/AABS

Released Date: 05/27/2020
File Number: 19-000209/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

M.A.

Applicant

and

Unifund Assurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: **Avvy Go**

APPEARANCES:

For the Applicant: M.A., Applicant
Sunish Uppal, Counsel

For the Respondent: Unifund Assurance Company
Mikhail Shloznikov, Counsel

Heard by way of written submissions

OVERVIEW

[1] The applicant was injured in a motor vehicle accident on March 3, 2016. While making a left-hand turn at an intersection, the applicant's vehicle was struck on the driver's side in a T-bone style collision. The applicant was taken to a hospital for examination. She was prescribed medication including morphine and Gravol, and then discharged to the care of her family physician.

[2] At the time of the accident, the applicant was working as a cleaner. The applicant was unable to return to work following the accident. She received Income Replacement Benefit (IRB) in the amount of $199.70 per week up until March 8, 2017.

[3] The applicant sought other benefits pursuant to the *Statutory Accident Benefits Schedule – Effective after September 1, 2010*[1] (the "*Schedule*"). The respondent declined to fund certain treatment and benefit. The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal (the "Tribunal").

ISSUES IN DISPUTE

[4] The issues in dispute identified and agreed to are as follows:

1. Is the applicant entitled to an IRB in the amount of $199.70 from March 8, 2017 to date and forward?

2. Is the applicant entitled to a medical benefit in the amount of $4,639.16 for psychological treatment, recommended by Synoptic Medical Assessments Inc. in a treatment plan (OCF-18) submitted on December 14, 2016 and denied on February 8, 2017?

3. Is the applicant entitled to a medical benefit in the amount of $1,447.76 for physiotherapy treatment, in a treatment plan (OCF-18) submitted on December 22, 2016, and denied on February 13, 2017?

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

5. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

[1] O. Reg. 34/10.

RESULT

[5] For the reasons set out below, I find that the applicant is entitled to receive IRB between March 8, 2017 and March 7, 2018 and the interest with respect to the overdue payment of that IRB. The applicant is not entitled to receive IRB from March 8, 2018 and forward. The applicant is not entitled to the medical benefits claimed. The applicant is also not entitled to any special award.

Issue 1: Is the applicant entitled to an IRB in the amount of $199.70 from March 8, 2017 to date and forward?

Relevant Provisions under the Schedule and the Test for IRB

[6] Section 5(1)1 of the *Schedule* sets out the test for an employed person seeking IRB. It stipulates that the insurer shall pay an IRB if the insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. This test was articulated in the decision of *M.M. v. Northbridge Personal Insurance Corporation*[2] as follows:

> To answer this question in the applicant's case, two determinations are required. First, what are the essential tasks of the applicant's employment? Second, is the applicant substantially unable to perform the essential tasks of his employment?

[7] Pursuant to s. 6(2)(b), an IRB is not payable beyond the 104 weeks unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.

[8] This Tribunal has found that the test for assessing entitlement to IRB must take into account whether a claimant's impairments prevent them working "in a competitive, real-world setting, taking into account employer demands for reasonable hours and productivity."[3]

[9] The applicant bears the onus of proof to show her entitlement to IRB.

[2] *M.M. v. Northbridge Personal Insurance Corporation*, 16-000682/AABS, 2017 CanLII 12608 (ON LAT) at para 18, aff'd 2017 ONSC 5885 at para 17

[3] 17-4389 v. Aviva General Insurance, 2018 CanLII 81886 (ON LAT) at par.38-39, and 16-0874 v. Certas Home & Auto, 2017 CanLII 69444 (ON LAT) at par.18, both citing Burgess v. Pembridge (FSCO A11-001160, June 14, 2013) at p.22

Part 1: Is the applicant entitled to IRB up to 104 weeks?

[10] Given there are two separate tests for IRB for the first 104 weeks, and the for the period beyond 104 weeks, I will first deal with the question of whether the applicant is entitled to IRB up to 104 weeks. The answer, as I will explain below, is yes.

i. The essential tasks of the applicant's employment

[11] I begin by examining the essential tasks of the applicant's employment at the time of the accident. The applicant worked as a cleaner for a [coffee shop] franchise. A Job Site Evaluation Report dated February 17, 2017 was completed by David Morris, a Kinesiologist, at the request of the respondent. Mr. Morris' report noted the applicant's job duties require her to do a number of physical tasks, some of which are highlighted as follow:

a. Weight bearing is a major requirement. All activities are done on the feet.

b. She would be required to stoop on a frequent basis while working, i.e. when cleaning washroom, changing garbage bags, dishwashing, sweeping, rinsing dishes

c. She would use kneeling in place of crouching when performing low level cleaning tasks

d. She would be required to crouch on an occasional basis while working

e. She would be required to twist on an occasional basis while working with scrubber

f. She would be required to push a cart of garbage, cleaning supplies cart, a mop, and a trolley with dishes

g. She would be required to lift and carry various items including garbage bags, dishes, cleaning supplies, ice, etc.; and

h. She would be required to reach above shoulder on an occasional basis

[12] Relying on the National Occupational Classification, Mr. Morris concluded the job demands for the applicant's employment as a cleaner should be categorized as a "Medium" strength classification.

ii. Is the applicant substantially unable to perform the essential tasks of her employment?

[13] Based on the evidence before me, I find the applicant is substantially unable to perform the essential tasks of her employment.

Applicant's employment status since the Accident

[14] By way of background I note that following the accident, as the applicant was unable to return to work, she received IRBs in the amount of $199.70 per week up until March 8, 2017. Thereafter, the applicant received Employment Insurance (EI) sickness benefits in the amount of $168 per week from April 2, 2017 until July 15, 2017.

[15] Between 2018 and 2019, the applicant made two attempts to return to employment with placement agencies. On June 2, 2018, the applicant returned to work as a part-time cleaner, but she quit her position in just over two weeks. In July 2018, the applicant joined an advertising job site for caregivers, and she was employed as a caregiver from July 1, 2019 to September 2, 2019. According to the respondent, the applicant is currently still promoting herself as someone who could care for children ranging from newborns to 6 years old and provide services including bathing, cooking, light housekeeping and putting kids to bed.

[16] The applicant's total employment earning in 2018 was $631.80 and in 2019 she earned $757.61.

[17] The applicant applied for and received Ontario Works (OW) from December 15, 2017 to July 31, 2019.

[18] On May 25, 2019, the applicant's family physician Dr. Veenema supported the applicant's application for Canada Pension Plan (CPP) disability benefits as Dr. Veenema opined it was unknown when the applicant could be expected to return to work. According to counsel, the applicant was granted CPP-disability benefits.

Medical Conditions of the applicant and impact on her ability to perform essential tasks of her employment

[19] A number of medical reports have been put before me by the parties. These reports show that the applicant was referred by her family physician to a neurologist, Dr. Farahani, who opined that the applicant may have suffered a post-concussion syndrome resulting from a head trauma due to the accident.

[20] The applicant was also subject to several Insurer's Examinations (IEs). I will start with the IE report from Dr. Efala, an Orthopedic and Spine Surgery Consultant and Interventional Pain Specialist, who examined the applicant on January 17, 2017, about 10 months after the accident. Dr. Efala conducted a physical examination of the applicant and also reviewed her medical reports before providing the following diagnostic impression about the applicant:

a. Post traumatic cervical spine dysfunction with Musculo-ligamentous injury

b. Degenerative disc disease of the cervical spine

c. Post traumatic lumbar spine dysfunction with Musculo-ligamentous injury

d. Degenerative disc disease of the lumbar spine

e. Left shoulder myofascial pain

f. Left elbow contusion

[21] Based on the available information, Dr. Efala concluded "to a reasonable degree of medical certainty, there is probable causal relationship between the current complaints and the accident reported on March 3, 2016". Dr. Efala concluded that the prognosis for a complete recovery to a pre-accident function and physical state is "guarded". Dr. Efala also opined that the applicant "has not reached the status of maximal medical improvement. The type of injury that this woman sustained can easily take 12-24 months to stabilize." Dr. Efala finally concluded that:

> In my opinion, considering the functional abilities and physical demands, [the applicant] suffers a substantial inability to perform the essential tasks of her employment.

[22] The applicant was also assessed by Dr. Alvi, an orthopedic surgeon on January 30, 2017. Dr. Alvi diagnosed the applicant with:

a. Mild myofascial strain to the cervical and lumbar spine with no overt traumatic-based compressive neurological deficit.

b. Mild myofascial strain to the left shoulder with generalized guarding, but no limitation of Range of Motion (ROM) impingement or weakness

c. Mild myofascial strain to the left hip with no limitation of ROM or femoroacetabular impingement

[23] The respondent asked me to prefer Dr. Alvi's report to Dr. Efala, on the basis that Dr. Alvi "conducted a more thorough physical examination of the applicant and provided a more fulsome explanation for his recommendation that the applicant resume her pre-accident activities including employment." The respondent also submitted that Dr. Alvi's diagnosis was "detailed and considered the applicant's pre-existing degenerative context".

[24] My reading of the reports of both Dr. Alvi and Dr. Efala shows that they have both conducted a thorough physical examination of the applicant. Moreover, it is clear that Dr. Efala has also considered the applicant's pre-existing degenerative context as can be seen in the diagnosis impression he had provided.

[25] More to the point, I find Dr. Alvi's diagnosis as well as conclusion about the applicant's ability to return to work is not a clear cut as what the respondent has tried to portray. When it comes to the applicant's ability to perform essential tasks, Dr. Alvi stated:

> Due to her deconditioning, she would benefit from performing her pre-accident employment tasks on a flexible schedule, utilizing pacing by sitting, standing, and taking breaks at the claimant's own discretion.

[26] I do not read the above conclusion from Dr. Alvi to confirm that that the applicant can substantially perform the essential tasks as she has done previously. Rather, she might be able to do so if all the accommodations that the applicant requires to perform her tasks are acceded to by her employer. But as noted by Mr. Morris, the applicant's job as a cleaner requires to be on her feet all the time, the idea of being able to "sit" is pretty much a non-starter.

[27] I also review the Functional Abilities Evaluation Report by Mr. Morris dated February 17, 2017 which suggests that the applicant was performing abilities within her pain tolerance as opposed to her maximum functional capabilities. I note, however, Mr. Morris is a kinesiologist, not a pain specialist. He also qualified his own finding of "psycho-emotional component" to the applicant's presentation by deferring to the psychologist on file. As such, I give his report limited weight.

[28] I then considered the Medical Report for CPP disability benefits completed by Dr. Veenema, the applicant's family physician stating that she was unable to work as of December 14, 2017, as another indication that the applicant was, as of that point in time, unable to perform the essential tasks of her employment. The respondent asked me to give Dr. Veenema's note no weight because the physician does not provide any explanation why the applicant was unable to work at that time, nor did the doctor explain the cause of the purported inability to work. The respondent also submitted that Dr. Veenema did not recommend the applicant to stop working, only confirmed that she could not work.

[29] I find the respondent's argument in this regard lacks merit. Dr. Veenema added this note in response to a specific question in the CPP Medical Report questionnaire asking, "Did you recommend to your patient that they stop working?" In reply, Dr. Veenema checked off "no", and then added "though I confirmed she could not on December 14, 2017". Dr. Veenema did not provide any further explanation because the Medical Report did not ask for one. Besides, whether the doctor recommended the applicant to stop working is irrelevant.

What is relevant is that the doctor confirmed the applicant could not work in December 2017.

[30] Next, the respondent submitted that "the medical consensus between the various assessors on file and the applicant's own treating physicians is that she sustained soft tissue injuries in the subject accident." Once again, the evidence before me is not as cut and dry as the respondent has stated. Apart from Dr. Farahani's diagnosis of a possible post-concussion syndrome, the applicant also undergone a psychological assessment on June 20, 2016 and was diagnosed with major depressive disorder and somatic symptom disorder, with pre-dominant pain, moderate. Indeed, if the applicant did only sustain soft tissue injuries, she would have been subject to the Minor Injury Guidelines (MIG) and would not even have received a full year of IRB to begin with.

[31] All in all, based on Dr. Veenema's clinical notes, the report by Dr. Efala and even the report by Dr. Alvi, I find that the applicant is substantially unable to perform the essential tasks of her employment as a cleaner within the first 104 weeks post accident. It is not reasonable to expect in a real world setting, that someone who works as a cleaner in a [coffee shop], could negotiate with her employer, such favourable terms of working conditions as to allow her to complete her tasks "on a flexible schedule, utilizing pacing by sitting, standing, and taking breaks at the claimant's own discretion." To find otherwise is to ignore the reality facing employees working in low-waged precarious jobs where they often lack the power to negotiate favourable working conditions.

[32] While the applicant has made two attempts to work in 2018 and 2019, I note the first attempt was made in June 2018, after the 104-week period has ended. It therefore has no bearing on the applicant's entitlement to IRB before the 104 weeks was up.

[33] In conclusion, I find the applicant entitled to IRB within the first 104 weeks post accident.

Part 2: Is the applicant entitled to IRB beyond 104 weeks?

[34] As noted above, to qualify for IRB beyond the 104 weeks, the applicant must demonstrate that she is suffering a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience. I find the applicant has failed to discharge her burden of proof in this regard.

[35] The applicant's submission is essentially that given Dr. Veenema's support for the applicant's application for CPP disability benefits in May 2019, it implies she will be unable to return to "similar work".

[36] The respondent submitted the fact that the applicant did return to employment in 2018 and 2019 and advertised herself as being physically capable of working as a caregiver should be dispositive of the question of entitlement to post-104 week benefits.

[37] I agree with the respondent on this point. By advertising that she is able to work as a caregiver, and by working as a caregiver on several occasions between 2018 and 2019, the applicant has thus failed to show that she suffers a "complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience". I came to this conclusion by taking into account the applicant's limited education (she has a grade 10 education), her age (age 60) and her past working experience (as a cleaner and a caregiver). The applicant may no longer be able to work in employment that comes with more physically demanding tasks, the applicant has shown that she has done some caregiver's work which is commensurate with her ability and educational background. Moreover, she appears to continue to seek employment in that field.

[38] I further note that the mere fact that the applicant is eligible for CPP-disability benefits does not automatically mean she qualifies for IRB beyond the 104 weeks given the different eligibility requirements under these two different benefit schemes. Finally, I observe that in the application for CPP-disability benefits, the applicant's medical condition was listed by Dr. Veenema as spondyloarthropathy with the year 2014 as the date of onset. It would thus suggest that the applicant's CPP-disability application was based on conditions unrelated to the accident.

[39] In conclusion, I do not find the applicant meets the test to qualify for IRB beyond the 104 weeks.

Issue 2: Is the applicant entitled to a medical benefit in the amount of $4,639.16 for psychological treatment, recommended by Synoptic Medical Assessments Inc. in a treatment plan (OCF-18) submitted on December 14, 2016 and denied on February 8, 2017?

[40] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical 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 any claimed medical expenses are reasonable and necessary.

[41] The applicant's submission in this regard is brief. She submitted that she has had recommendations for psychological counselling and continues to be prescribed anti-depression medication by Dr. Veenema.

[42] The respondent relied on the report of Dr. Weinberg dated January 27, 2017 following an in-person assessment which concluded that the treatment requested was not reasonable and necessary. Among other things, Dr. Weinberg noted in the report that the applicant "denied the need for any additional psychological intervention and noted that she has four sessions remaining with her Social Worker and would return to complete these sessions, 'if necessary'."

[43] I also note that there is no evidence that the applicant has attended any additional psychological treatment since December 2016. Her report of increased anxiety to her family physician appears to arise from a new relationship that is "not going well". Given the limited evidence submitted by the applicant in this regard, I find she has not discharged the burden of proving that the psychological treatment sought is reasonable and necessary.

Issue 3: Is the applicant entitled to a medical benefit in the amount of $1,447.76 for physiotherapy treatment, in a treatment plan (OCF-18) submitted on December 22, 2016, and denied on February 13, 2017?

[44] The applicant submitted that she has had recommendations for physical treatment from both her family physician as well as independent assessors. She struggles to function with her condition and pain symptoms, despite significant medication. The applicant further submitted that physical treatment provides temporary alleviation of symptoms and temporary improvement in her level of functioning.

[45] Other than her submission, the applicant did not point to any evidence to support her position in this regard.

[46] The respondent pointed to Dr. Alvi's orthopaedic assessment report dated December 22, 2016, which concluded that the physiotherapy assessment sought was not reasonable or necessary. Dr. Alvi opined there is no objective orthopaedic impairment and recommended a home-based exercise program and medication to treat the applicant's soft tissue injuries.

[47] The respondent also submitted that the applicant has not led any evidence that a third round of passive therapy was reasonable and necessary as of December 2016. The recommendation of Dr. Efala in his report for a referral to a multidisciplinary rehabilitation centre and "active physical modalities" is broad and does not consider the treatment received to date and the applicant's response to that treatment.

[48] In view of the lack of sufficient evidence, I therefore find the applicant has not discharged her onus to prove that the treatment she sought is both reasonable and necessary.

Issue 4: Is the applicant entitled to interest for the overdue payment of benefits?

[49] In view of my findings above, I find the applicant is entitled to interest only with respect to the overdue payment of the IRB between March 8, 2017 and March 7, 2018.

Issue 5: Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

[50] The applicant has not led any evidence or made any submissions with respect to a special award. While I may have allowed the applicant's partial claim for IRB, I cannot find any evidence that would suggest the respondent has unreasonably withheld or delayed the payment of the IRB.

FINDING AND ORDER

[51] The applicant is entitled to receive IRB between March 8, 2017 and March 7, 2018 and the interest with respect to the overdue payment of that IRB. The applicant is not entitled to receive IRB from March 8, 2018 and forward. The applicant is not entitled to the medical benefits claimed. The applicant is also not entitled to any special award.

Released: May 27, 2020

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Avvy Go
Adjudicator