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

Ontario

Date: 2018-01-03
Tribunal File Number: 16-004031/AABS
Case Name: 16-004031/AABS v State Farm Insurance Company

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:

Applicant

Applicant

and

State Farm Insurance Company

Respondent

DECISION

ADJUDICATOR: Deborah Neilson

APPEARANCES:

For the applicant: Andrej Rondas, paralegal for the applicant

For the respondent: Marni Miller, counsel for the respondent

HEARD: Written Hearing: June 19, 2017

I. OVERVIEW

[1]. The applicant, [the applicant], was injured in a motor vehicle accident on December 16, 2014. She applied to the respondent, State Farm Insurance Company, for accident benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") and received weekly income replacement benefits ("IRBs") at the rate of $278.11 per week from the respondent. The respondent terminated IRBs effective August 5, 2015 and denied the applicant's claims for psychological services and physiotherapy treatment. The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for payment in relation to the IRB, the psychological services and the physiotherapy treatment.

[2]. The applicant alleges that she has pain complaints and psychological difficulties that prevent her from working at the employment she was engaged in at the time of the accident. The respondent claims that the applicant is able to work at her pre-accident employment. If she is not, the respondent claims that it is because of pre-accident and post-accident health issues or injuries that have no relation to the accident.

II. ISSUES IN DISPUTE

[3]. A case conference was conducted in this matter, but the parties were unable to settle the issues in dispute. Upon review of the submissions, the issues in dispute before this hearing are:

a) Is the applicant entitled to receive an IRB in the amount of $278.11 per week for the time period of August 5, 2015 to the present and ongoing?

b) Is the applicant entitled to receive payment for a cost of examination in the amount of $2,200.00 for a psychological assessment pursuant to a treatment and assessment plan OCF-18 dated July 5, 2016?[1]

c) Is the applicant entitled to receive a medical benefit in the amount of $2,643.60 for physiotherapy services pursuant to a treatment and assessment plan OCF-18 dated July 25, 2015?

[4]. The claim for medical benefits in the amount of $2,643.60 for physiotherapy services has been resolved. The respondent wrote to the applicant on March 14, 2017 advising that it would pay for the physiotherapy services in issue in accordance with the Professional Service Guidelines to a maximum of $2,643.60.

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[1] The issue in dispute was initially listed as a medical benefit and has been changed from the case conference report in order to reflect the submissions of the parties. I was provided with no treatment plans recommending psychological counselling. The applicant's submissions refer to a psychological assessment for $2,200 recommended by Dr. Pilowsky being in issue and the application contained a denial letter for a treatment plan dated July 5, 2016 enclosing the last page of a treatment plan prepared by Dr. Pilowsky recommending a psychological assessment at the cost of $2,200.00.

The applicant submitted that this was an approval of the last issue in dispute and is a final answer to the applicant's claim. Accordingly, I need not determine this issue.

III. RESULT

[5]. I find that the applicant is not entitled to IRBs or the psychological assessment by Dr. Pilowsky. While the psychological assessment may be necessary, the applicant has failed to prove that the fees charged by Dr. Pilowsky for her assessment are reasonable.

IV. BACKGROUND

[6]. The applicant is 39 years old and at the time of the accident, was employed as a cashier and team leader at a restaurant, Paramount Fine Foods. She was also employed as a driving instructor.

[7]. The applicant has had pre-accident health problems consisting of pain in both her knees since 2003 and was diagnosed in March 2013 with mild osteoarthritis and chondromalacia patella of both knees. She also complained of heel pain and ankle pain in July 2014 that caused her to limp. She had right shoulder pain from a 2013 motor vehicle accident that still bothered her in September 2014 and she was referred to a physiatrist. She had complaints of fatigue in January 2014, and was suffering from anxiety, apprehension, insomnia, and severe depression in February 2014. She was prescribed Cipralex for the depression and referred to a psychiatrist. Her depression and anxiety resolved by April 2014. However, the complaints of insomnia and fatigue continued.

[8]. The applicant submits that she was taken by ambulance to a hospital on December 16, 2014, after the car she was driving was rear-ended while she was waiting to make a left turn. No statement or affidavit from the applicant, hospital records or ambulance call report was filed as evidence to support the applicant's submission.

[9]. The clinical notes and records of the applicant's family doctor, Dr. Ansari, were filed. The applicant saw Dr. Ansari the day after the accident with complaints of back pain and neck pain. She returned full-time to Paramount Foods two days after the accident, initially refraining from lifting chairs off the table at the start of her shift. Several months after the accident she sprained her left knee in mid-February 2015 after she fell through stairs and sustained a possible tear of the medial meniscus in the left knee. The applicant no longer had back pain by that time.

[10]. The applicant told the respondent's assessors that Paramount Foods gradually reduced her hours after she returned to work. After a fight with her supervisor, the applicant quit her job in mid-March 2015 due to stress and pain.

[11]. Dr. Ansari's records further disclose that In March 2015, the applicant complained of having heel pain for a few months. An x-ray taken in April 2015 disclosed the applicant had heel spurs consisting of posterior plantar calcaneal enthesophytes on her heels. In June 2015 the applicant started complaining of right knee pain and was diagnosed with a right knee sprain. She twisted and sprained her ankle at work in July 2015. In August 2015 she was diagnosed with plantar fasciitis. The applicant did not provide any information about where she was working or what type of work she was doing when she sprained her ankle.

[12]. The respondent stopped paying the applicant IRBs effective August 15, 2015 based on the findings of its insurers examination assessments. An OCF-2 Employer's Confirmation of Income form from Canadian Academy of Defensive Driving dated May 2015 and its letter from 2017 provide conflicting dates for when the applicant stopped working as a driving instructor. It is not clear if the applicant was working as a driving instructor when she sprained her ankle in July 2015 or if the injury occurred at some other employment.

V. ENTITLEMENT TO IRBs

[13]. The applicant claims that because of the accident, she had to stop working in March 2015 and is no longer able to work. In order to claim entitlement to an IRB, s.5(1) of the *Schedule* requires the applicant to prove on a balance of probabilities that she was employed at the time of the accident and, as a result of the accident and within 104 weeks of the accident, she sustained a substantial inability to engage in the essential tasks of that employment. Under s.6(2)(b) of the *Schedule*, the respondent is not required to pay an IRB after the first 104 weeks of disability unless the applicant proves on a balance of probabilities that, as a result of the accident, 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.

[14]. There is no dispute that the applicant was employed at the time of the accident. She had been working for Paramount Foods as a team leader and cashier since September 2014. The respondent submits that if the applicant is unable to work, it is not because of any impairment resulting from injuries she sustained in the accident, but from pre-accident medical conditions or post-accident injuries. Therefore, to determine entitlement to IRBs, the inquiry can be divided into three steps:

A. Causation;
B. Does the applicant suffer a substantial inability to perform the essential tasks of her pre-accident employment; and
C. Does she suffer a complete inability to engage in any employment or self-employment for which she is reasonably suited by education, training or experience.

A. Causation

[15]. The applicant is entitled to an IRB only if the accident caused her to sustain an impairment that renders her unable to work as a team leader and cashier, and the inability to work manifests within 104 weeks of the accident. I conclude that if the applicant suffers from an impairment that renders her unable to work as a team leader and cashier, she has not shown that it was caused by the motor vehicle accident and manifested within 104 weeks of the accident. If I am wrong, the extent to which an impairment that renders her unable to work will be discussed within step B, below.

[16]. The applicant admits that she has a significant pre-accident medical history, and claims the accident exacerbated those medical conditions. The applicant submits that she now has chronic pain because of the accident and is unable to work as a result of her pain complaints.

[17]. The allegation that the applicant now has chronic pain is not supported by any evidence. If the applicant was diagnosed with chronic pain, she failed to produce any evidence of that diagnosis.

[18]. The applicant relies on an OCF-3 disability certificate prepared by her physiotherapist, Dipal Modi, in January 2015. I find Mr. Modi's disability certificate does not assist the applicant. Mr. Modi indicated the applicant sustained soft tissue injuries in the accident to her neck and back including a quadriceps muscle injury and pain in her ankle and foot. Mr. Modi indicated the applicant could return to modified work for financial reasons. He also indicated that the applicant had a substantial inability to engage in the essential tasks of her occupation that was anticipated to last for another 9 to 12 weeks, or to April or May 2015 at the latest.

[19]. According to the disability certificate, Mr. Modi was aware that the applicant was in a previous motor vehicle accident in 2013. It appears he did not know of the rest of the applicant's pre-accident medical history as he did not list it on the disability certificate. I do not find the disability certificate assists the applicant as it predates the period of time in which entitlement to IRBs are in issue.

[20]. The applicant also relies on the pre-screening report of Dr. Pilowsky, psychologist, dated July 5, 2016. I give little weight to Dr. Pilowsky's report for the following reasons. She did not comment on the applicant's treatment of severe depression and anxiety in early 2014 and her referral to a psychiatrist. In fact. Dr. Pilowsky stated the applicant had no pre-accident complaints. Dr. Pilowsky appears to have been unaware of the applicant's pre-accident complaints of fatigue, insomnia, knee pain, shoulder pain, or heel pain. There is no indication in her report of how the applicant's insomnia or fatigue is different from her pre-accident complaints.

[21]. Dr. Pilowsky reported that the applicant developed pain after her accident, which interferes with her daily performance in all aspects of her life. It is not clear

whether the pain she refers to is from the applicant's fall through the stairs in mid-February 2015, her right knee sprain in June 2015, twisting and spraining her ankle at work in July 2015 or the diagnosis in August 2015 of plantar fasciitis. There is no evidence that the applicant's pain has any relation to the soft tissue injuries she sustained in the accident. Nor does Dr. Pilowsky comment on what relationship those post-accident conditions have on the applicant's complaints to her of depressed mood, sadness, stress, nervousness, anxiety, dread, low concentration, decreased memory, low concentration and difficulties maintaining focus. Some explanation is required because there is no mention of those complaints in Dr. Ansari's notes. His note from early July 2015 states that there was no depression, no stress and no headaches. At this point, the applicant had quit her job at the restaurant. Yet Dr. Pilowsky seemed to be under the impression that the applicant's psychological complaints all arose from shortly after the accident.

[22]. Dr. Pilowsky believed the applicant did not return to work after the accident and that she was a restaurant manager, neither of which is supported by the documentary evidence. Although the respondent pointed out these shortcomings in Dr. Pilowsky's report, the applicant did not address them at all. I find Dr. Pilowsky's opinion is based on incomplete or erroneous information and is, therefore, unreliable. For these reasons I am unable to accept Dr. Pilowsky's opinion that the applicant's psychological complaints are related to the accident.

[23]. The respondent relies on the functional capacity assessment of Dr. Nima Pardisnia, chiropractor and physiotherapist, conducted in early May 2015 at the respondent's request. Dr. Pardisnia's opinion was that the accident was not the cause of the applicant's left knee osteoarthritis and the heel spurs.

[24]. The applicant submits that Dr. Pardisnia's opinion should be given little weight because she stated that the exacerbation and relationship of the pre-accident medical conditions to the accident was unclear. I disagree with the applicant and find Dr. Pardisnia's report was of assistance. Dr. Pardisnia left it up to the respondent's discretion on whether to obtain an opinion from an orthopaedic surgeon. The applicant submitted that the respondent should be faulted for not referring her to an orthopaedic specialist. The fact that the respondent did not get a second opinion from an orthopaedic specialist, but got it from a family physician, does not diminish Dr. Pardisnia's opinion on causation. Especially when the applicant has presented no evidence that the osteoarthrosis and the heel spurs are related in any way to the accident.

[25]. Dr. Hershberg is a general practitioner who conducted an insurer's examination at the respondent's request in July 2015. Dr. Hershberg diagnosed the applicant with resolving cervical spine strain, lumbar spine strain, and left knee sprain injuries. She stated that the applicant's left knee pain was likely exacerbated by the accident.

[26]. I accept Dr. Hershberg's opinion that the applicant sustained a resolving cervical spine strain, lumbar spine strain, and left knee sprain injuries. However, I am unable to give full weight to her opinion that those injuries were caused by the accident or that the accident exacerbated the pre-existing left knee injury. Dr. Hershberg's opinion was based on incomplete information. She was aware of some of the applicant's pre-accident medical problems, such as her heel and knee complaints. However, Dr. Hershberg did not have a copy of Dr. Ansari's clinical notes and records and was not told by the applicant about her left knee injury in February 2015 or the right knee sprain in June 2015.

[27]. The applicant told Dr. Hershberg that she left work in March 2015 because of stress and pain after her hours were gradually reduced to 20 to 25 hours per week and she fought with her employer. The applicant's stress and pain may have been caused by her fall in February 2015. I can only speculate because, as indicated in paragraph 9, the applicant did not provide any affidavit evidence or testimony. I am unable to determine the extent to which Dr. Hershberg relied on that information for the diagnosis that the applicant's left knee complaint was exacerbated by the accident. Because the applicant did not tell Dr. Hershberg of her post-accident injuries, I am unable to place much weight on Dr. Hershberg's opinion that the accident exacerbated the applicant's left knee condition.

[28]. I find that the opinions of the treatment providers and assessors about the accident impairments are not reliable because they either were not aware of the applicant's pre-accident medical or her post-accident medical history. In the absence of evidence from the applicant, and without any analysis by the medical experts of the effect of those complaints and injuries on the applicant's present complaints, the applicant has failed to prove that the accident has caused any impairment. Without some direct evidence from the applicant, I am unable to find that the stress and pain that led to the applicant quitting her job at Paramount in March 2015 were related to the applicant's 2014 motor vehicle accident.

B. Substantial Inability to Perform the Essential Tasks of Employment

[29]. If I am wrong about causation, I must look at what the applicant's essential tasks of her employment were before determining whether she had a substantial inability to perform those tasks because of the accident.

[30]. According to Dr. Hershberg and Dr. Pardisnia, as a team leader and cashier, the applicant was required to stand constantly and walk around serving customers. She was required to process orders and payment transactions, ring customers through cash, manage the floor, prepare the schedule, send employees on break, deal with customers at their table and clear tables. She was not required to lift over 5 kg. The applicant provided no evidence of what the essential tasks were of her job as a driving instructor.

[31]. Dr. Pilowsky believed the applicant was a restaurant manager and did not list any of the essential tasks of the applicant's occupation. This demonstrates that Dr.

Pilowsky had no understanding of the applicant's actual job tasks. For this reason I give little weight to her opinion about the applicant's ability to work.

[32]. Dr. Hershberg and Dr. Pardisnia both examined the applicant and both concluded that she did not have any functional impairment that prevented the applicant from working. She did not demonstrate a substantial inability to perform the essential tasks of her occupation as a team leader and cashier. The respondent relied on those conclusions to terminate the applicant's IRBs. The applicant submits that the respondent has failed to show that she is able to work the same hours she was able to work before the accident. I reject the applicant's submission as it assumes that she has proven that she cannot work 8 hours a day. However, the applicant provided no evidence that she is unable to work for 8 hours per day.

[33]. The applicant advised Dr. Pardisnia that, at the time of his assessment, she was able to do able most of her tasks, but had difficulty with lifting and prolonged standing and walking. I accept Dr. Pardisnia's opinion on the applicant's ability to work because it is based on his findings and observations from his assessment of the applicant. On assessment, the applicant was able to lift at the heavy strength level at all heights and perform all the required tasks except reaching and gross dexterity tasks at waist level. Dr. Pardisnia could not determine why that was the case because the applicant's only complaint at the time was her left knee pain.

[34]. Dr. Pardisnia observed that the applicant was able to stand for 97 minutes and to walk at a frequent level. The applicant submits that I should disregard Dr. Pardisnia's conclusions because she was unable to conclude whether the applicant could work an 8 hour shift. The applicant has failed to prove she is unable to work because of any accident related injuries. If the applicant had provided reliable or firsthand evidence that she could not stand or work for 8 hours per day, her submission may be more persuasive. However, in the absence of any firsthand or reliable evidence from the applicant on her inability to work, I do not agree that there is an onus on the insurer to prove that the applicant can work for 8 hours per day. Especially since the applicant returned to work at full time hours two days after the accident and stopped only after she injured her knee in an unrelated incident. Although she advised the respondent's assessors that she stopped work in March 2015 due to pain and stress, there is no evidence that the applicant's pain or stress was because of accident related injuries.

[35]. The applicant did not provide any evidence that she was unable to work an 8 hour shift. Accordingly, I accept Dr. Pardisnia's opinion that the applicant is able to perform the essential tasks of her employment as a team leader and cashier for Paramount.

[36]. Dr. Hershberg found that the applicant had not yet reached maximum medical improvement from a musculoskeletal perspective. The applicant reported about 60% improvement of her accident injuries. However, Dr. Hershberg determined that the applicant was able to return to her pre-accident employment because she

demonstrated full musculoskeletal ranges of motion and did not demonstrate any functional impairment as a result of the accident. I have no reason not to accept Dr. Hershberg's opinion as it is based on her expertise as a doctor and her observations and assessment of the applicant.

[37]. The applicant has not provided an affidavit or statement about her functional abilities or an explanation of the effect of her post-accident injuries on her ability to work. Nor has she provided any reliable expert opinion. The applicant has failed to prove on a balance of probabilities she is substantially unable to perform the essential tasks of a team leader and cashier at a restaurant or as a driving instructor. I accept Dr. Hershberg's and Dr. Pardisnia's opinions that the applicant is substantially able to perform the essential tasks of a team leader and cashier at a restaurant.

[38]. Since the applicant was employed as a team leader and cashier for a restaurant at the time of the accident and she is able to return to that occupation, it is not necessary for me to determine whether she has a complete inability to engage in any occupation or which she is reasonably suited by way of her education, experience or training.

VI. ENTITLEMENT TO A PSYCHOLOGICAL ASSESSMENT

[39]. The respondent is required to pay for all reasonable fees charged by a health practitioner for reviewing and approving a treatment and assessment plan or for preparing a disability certificate under s.25 of the *Schedule*. The determination of whether the psychological assessment recommended by Dr. Pilowsky is payable can be broken down to a two part analysis:

A. Is Dr. Pilowsky's assessment or examination necessary under s.25 of the *Schedule* ; and
B. Are the fees charged for the psychological assessment reasonable?

A. Necessity of a Psychological Assessment

[40]. The test for entitlement to the cost of an examination does not require the applicant to prove that she has a psychological impairment caused by the accident. It is whether there is a possibility that she has a psychological impairment caused by the accident. If so, the applicant must show on a balance of probabilities that an assessment is necessary under s.25 of the *Schedule* for the review of or preparation of a disability certificate or treatment plan and that the fees charged for that assessment are reasonable.

[41]. Although I determined that Dr. Pilowsky's opinion about causation and the applicant's ability to work was not reliable, this does not mean that I completely reject her report. Dr. Pilowsky reported that the applicant was experiencing nightmares of the accident. This raises the possibility that the applicant's

psychological complaints may have some relation to the accident. The possibility of a psychological condition related to the accident is supported by the applicant's complaints to Dr. Hershberg of stress and mood changes since the accident.

[42]. Dr. Pilowsky stated in her pre-screening report that the purpose of the assessment is to focus on gathering information to diagnose the applicant's conditions and to guide her treatment. The purpose is also to determine whether or not psychological intervention would help the applicant manage her psychological symptoms caused by the accident. I find that these purposes are what is contemplated under s.25(1)3 of the *Schedule.*

[43]. The lack of information and inclusion of incorrect information in the pre-screening report is a good reason why a psychological assessment is necessary. Dr. Pilowsky obviously did not have enough time or information to make a reliable determination on causation and treatment in her pre-screening report. I find that without a comprehensive assessment, Dr. Pilowsky is not in a position to determine whether psychological treatment as a result of the accident is necessary, the extent to which the accident may or may not contribute to the applicant's psychological distress and, accordingly, the extent to which treatment for that accident related distress may be required or whether the applicant requires psychological treatment from some other reasons. For these reasons, I find that, on a balance of probabilities, Dr. Pilowsky's assessment is necessary to determine whether psychological treatment is required because of the accident and if the applicant will respond to any accident related psychological treatment. For these reasons, I find the assessment is necessary under s.25 of the *Schedule.*

B. Reasonableness of the Fees

[44]. Section 25 of the Schedule provides some guidance on whether the fees charged for an assessment are reasonable. Under s. 25(5)(a) of the Schedule, an insurer is not required to pay more than $2,000.00 for an assessment. Under s.25(3) of the Schedule, an insurer is not required to pay for expenses related to professional services rendered to an insured person to conduct a s.25(1) assessment that exceed the maximum rate under the Guidelines. The Superintendent of Insurance has published a Professional Services Guideline [2] that sets out the maximum hourly fees that various health practitioners, including psychologists, may charge.

[45]. I was not provided with the complete OCF-18 treatment plan. The last page from the treatment plan was attached to the application to the Tribunal. That page is supposed to list the hourly rate or unit rate for the assessor's services. The page states that Dr. Pilowsky is to perform the assessment. The assessment fee is listed as $2,000.00 for 1 unit. This amount is within the $2,000.00 limit imposed for an assessment under s.25(5)(a) of the *Schedule.* However, I am unable to

[2] *Professional Services Guideline, Superintendent's Guideline No. 03/14*, September 2014.

determine if the fee charged exceeds the *Professional Services Guideline* hourly rate. The documentation support activity fee is $200.00 for 1 unit. The measurement for each unit is listed as “PR.” The OCF-18 User’s Manual on the HCAI Information Resource web site states that “PR” means “procedure.” No explanation is provided as to as to how much time is required for one unit of a procedure or why there is an $1,800.00 difference between the assessment procedure and the documentation support activity procedure.

[46]. Section 25(3) of the *Schedule* states an insurer is not required to pay for assessment expenses that exceed the maximum rate established under the Guidelines. I find that an hourly rate charged at the maximum hourly rate in the *Professional Services Guideline* or any amount less than the maximum is a reasonable fee. However, I have been provided with no evidence of what Dr. Pilowsky’s hourly rate is or the means of calculating her hourly rate. This means I am unable to determine whether the treatment plan proposes an hourly rate for Dr. Pilowsky that exceeds the *Professional Services Guideline* hourly rate for psychologists. Accordingly I am unable to determine whether the fees charged for the psychological assessment are reasonable.

[47]. I find the psychological assessment by Dr. Pilowsky is, on a balance of probabilities, necessary, but I am unable to determine if it is reasonable. For this reason, the applicant’s claim for the psychological assessment in the July 5, 2016 treatment plan is dismissed.

ORDER

[48]. The applicant’s appeal is dismissed.

Released: January 3, 2018

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Deborah Neilson, Adjudicator