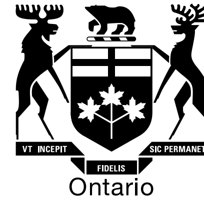
LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario



2017 CanLII 9811 (ON LAT)

Date: **January 24, 2017**
Tribunal File Number: **16-000879/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:

Applicant

Applicant

and

Unifund Assurance Company

Respondent

DECISION

Adjudicator: Anna Truong

Appearances: Salina Chagpar, counsel for the Applicant

Marni Miller, counsel for the Respondent

Heard in writing on: November 16, 2016

OVERVIEW

[1] S.G. ("the Applicant") was involved in an automobile accident on January 2, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*").

[2] The Applicant applied for a non-earner and rehabilitation benefit, but was denied by the Respondent. The Applicant disagreed with this decision and submitted an application for dispute resolution services to the Licence Appeal Tribunal –

Automobile Accident Benefits Service (the "Tribunal"). The matter proceeded to a case conference, but the parties were unable to resolve the issues in dispute.

PRELIMINARY ISSUE

[3] The Applicant submitted documents subsequent to the deadline outlined in the case conference adjudicator's Order dated September 29, 2016. This Order states that the Applicant's evidence should be submitted to the Tribunal and the Respondent no later than October 4, 2016. The Applicant's Reply was due no later than October 31, 2016.

[4] The Applicant submitted her reply on November 3, 2016 without explanation as to why it was late. This reply included two brand new documents that had not been previously disclosed to the Respondent. These documents are Dr. Shaul's clinical notes and records from July 31, 2015 to November 1, 2016, and Dr. Alireza Naderipour's Report dated September 9, 2016.

[5] In correspondence dated November 7, 2016, the Respondent requests that these two documents be excluded from consideration. The Respondent submits that the materials are in breach of the case conference adjudicator's Order and would prejudice the Respondent, because it would not have a chance to review and respond to the report. The Respondent submits that the report of Dr. Naderipour was created on September 12, 2016, before the two case conferences held in this matter, and there was no reason why the Applicant could not have disclosed the report prior to November. The Respondent further submits that the Applicant did not disclose the documents in accordance with the *Licence Appeal Tribunal Rules of Practice and Procedure* (the "*Rules*") and did not seek consent of the Tribunal prior to disclosure. Therefore, the Respondent requests that the two documents contained in the Applicant's reply be excluded.

[6] In response, the Applicant sent correspondence dated November 13, 2016. In this letter, the Applicant submits that the case conference adjudicator indicated materials may still be accepted if submitted within "a few days" after the due date and that the case management officer confirmed that Reply materials would still be accepted as long as they were not submitted immediately before the written hearing. The Applicant submits that Dr. Naderipour's report and Dr. Shaul's clinical notes were both received on November 1, 2016 and they were served immediately upon receipt. The Applicant further submits that the *Rules* require disclosure of documents at least 10 days prior to the date of a hearing and the Applicant submitted it well in advance of the November 16, 2016 hearing. Therefore, the Applicant requests that the two documents be considered given the circumstances.

[7] The *Rules* include provisions in Rule 9 for disclosure of documents. Rule 9.3 allows the Tribunal to order that the parties either disclose its evidence at least 10

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days prior to the hearing <u>or as ordered by the Tribunal</u>. Rule 9.4 states that if a party fails to comply with any Rule or Order with respect to disclosure, that party may not rely on the document as evidence, without the consent of the Tribunal.

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[8] I do not have any evidence before me of what was discussed at the Case Conference and what was discussed with the case management officer. I only have the case conference adjudicator's Order, which is quite clear with respect to the deadlines. The Applicant's failure to submit the documents by these deadlines is in violation of Rule 9.3. Furthermore, a Reply is meant for the Applicant to respond to any arguments raised by the Respondent in their submissions. Its purpose is not for the Applicant to present new material, which is what the Applicant has done in this case. The Respondent has not had a chance to review and respond to these documents. It would prejudice the Respondent and go against the fundamental principles of fairness if I were to allow these documents into the record.

[9] Moreover, the Applicant did not request the consent of the Tribunal prior to the disclosure of these documents and did not include an explanation with the documents as to why they were submitted after the deadline. The Applicant only wrote in after the Respondent objected to the documents. There was no reason why the Applicant could not have raised these documents at the two Case Conferences before the hearing. This would have allowed the case conference adjudicator and the Respondent to adequately deal with these documents. Waiting until the Reply to disclose these documents for the first time amounts to sharp practice and it is against the *Rules*. Therefore, based on the reasons above, I have excluded Dr. Shaul's clinical notes and records from July 31, 2015 to November 1, 2016, and Dr. Alireza Naderipour's Report dated September 9, 2016 from the hearing record.

ISSUES TO BE DECIDED

[10] The following are the issues to be decided:

1. Is the Applicant entitled to a non-earner benefit in the amount of $185 per week from July 3, 2015 to present?

2. Is the Applicant entitled to a rehabilitation benefit in the amount of $147, being the balance of a partially approved OCF-18 Treatment and Assessment Plan dated March 20, 2015 by Bloor West Therapy Orthopaedic & Sports Medical Centre?

3. Is the Applicant entitled to interest for any overdue payment of benefits?

4. Is the Applicant entitled to costs of the proceeding?

5. Is the Applicant entitled to a “special award”, because the Respondent unreasonably withheld or delayed payments pursuant to section 10 of Ontario Regulation 664?

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RESULT

[11] Based on the totality of the evidence before me, I find that:

1. The Applicant is not entitled to a non-earner benefit in the amount of $185 per week from July 3, 2015 to present.

2. The Applicant is not entitled to a rehabilitation benefit in the amount of $147, being the balance of a partially approved OCF-18 Treatment and Assessment Plan dated March 20, 2015 by Bloor West Therapy Orthopaedic & Sports Medical Centre.

3. The Applicant is not entitled to any interest.

4. The Applicant is not entitled to costs of the proceeding.

5. The Applicant is not entitled to a “special award”.

ANALYSIS

[12] The only evidence submitted by the parties is documentary evidence and I have considered all of the documents submitted, except for those I have excluded above due to the violation of Rule 9.

1. **Non-Earner Benefit**

[13] The test for entitlement to a non-earner benefit is set out in section 12 (1) of the *Schedule*. The Applicant must prove that she suffers from a complete inability to carry on a normal life within 104 weeks of the accident. Section 7(b) of the *Schedule* states that a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

[14] The Respondent has submitted the seminal case of *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391 (“*Heath”*), which outlines several principles

for the determination of entitlement to a non-earner benefit. These principles include:

- There must be a comparison of the Applicant's activities and life circumstances before the accident to those post-accident.
- The Applicant's activities and life circumstances before the accident must be assessed over a reasonable period prior to the accident. The duration of which will depend on the facts of the case.
- All of the Applicant's pre-accident activities must be considered, but greater weight may be placed on activities that were more important to the Applicant's pre-accident life.
- The Applicant must prove that his/her accident related injuries continuously prevent him/her from engaging in substantially all of his/her pre-accident activities. This means that the disability or incapacity must be uninterrupted.
- "Engaging in" should be interpreted from a qualitative perspective. Even if an Applicant can still perform an activity, if the Applicant experiences significant restrictions when performing that activity, it may not count as "engaging in" that activity.
- If pain is the primary reason that an Applicant cannot engage in former activities, the question is whether the degree of pain practically prevents the Applicant from performing those activities. The focus should not be on whether the Applicant can physically perform those activities.

[15] I have noted these principles and used them to guide my analysis with respect to the Applicant's entitlement to a non-earner benefit.

[16] In support of her claim for a non-earner benefit, the Applicant submits two OCF-3s and a psychological report. Dr. Paul Matthews, the Applicant's family physician, completed an OCF-3 Disability Certificate dated February 10, 2015, which states that the Applicant suffers from low back pain and an injury of muscle and tendon at neck level/cervical spine. In Part 6 of this OCF-3, Dr. Matthews indicates that the Applicant met the test for a non-earner benefit for a duration of more than 12 weeks.

[17] Dr. Matthews completed another OCF-3 dated July 30, 2015, which states that the Applicant suffers from low back pain, pain in her right shoulder, post-traumatic nervousness and a state of emotional shock and stress. Again in Part 6, Dr. Matthews indicates that the Applicant met the test for a non-earner benefit for a duration of more than 12 weeks.

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[18] In the Psychological Report of Dr. Andrew Shaul, clinical psychologist, dated March 29, 2015, he notes that the Applicant reports that pre-accident:

- She did the household chores, including cooking and preparing meals.
- She regularly cleaned washrooms, vacuumed, swept the floors, washed dishes, dusted and did laundry.
- She enjoyed shopping, hosting events and spending time with her family.
- She took care of her children.

[19] Dr. Shaul notes that post-accident, the Applicant reports that:

- She is unable to do things with her children and take care of them.
- She is unable to do her housework.
- She is unable to attend social gatherings, shop or walk at the mall.
- She unable to entertain guests, or visit friends and family.

[20] Dr. Shaul opines that the Applicant suffers a complete inability to carry on a normal life as a result of the subject accident, because the accident has “impacted every facet” of her life and she is unable to participate in her day to day activities. He further opines that she is limited both physically and emotionally and is unable to engage in most of her pre-accident activities, including her caregiving and household activities.

[21] In the Independent Psychology Evaluation of Dr. Alan Chan, clinical psychologist, dated June 23, 2015, he notes that the Applicant reports that post-accident:

- She wakes her children and helps them get organized and ready for school.
- She will try to make her children breakfast and lunch.
- She will drive to pick up her children at school.
- She will occasionally go to the grocery store to get snacks for her children.
- She typically goes to church, but has not gone in the past three weeks.
- She is independent of all self-care activities.
- She is able to drive without significant anxiety both on the highway and city streets, but she feels anxious as a passenger.

[22] Dr. Chan concludes that the Applicant suffers from Major Depressive Disorder, but she does not suffer from a complete inability to carry on a normal life as a result of injuries sustained in the index accident from a psychological perspective.

[23] In the Independent Medical Evaluation of Dr. Ahmad Belfon, M.D., dated June 23, 2015, he opines that the Applicant’s presentation is consistent with sprain/strain of the cervical and lumbar spine, sprain/strain of the right shoulder girdle and post-traumatic headaches. He concluded from a strictly musculoskeletal perspective, the Applicant does not suffer a complete inability to carry on a normal life.

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[24] On September 20, 2015, the Applicant was involved in a second motor vehicle accident and applied for benefits. The Respondent arranged additional assessments to determine her entitlement to those benefits.

[25] In the Assessment of Attendant Care Needs of Ms. Angela Bertolo, Registered Occupational Therapist, dated November 9, 2015, she opines that the Applicant was independent of all her personal care tasks and the only housekeeping task that she required assistance with was toilet cleaning. On the day of the assessment, Ms. Bertolo observed that the Applicant demonstrated the ability to reach above head level, reach her feet, sit, stand, bathtub transfer, and perform tasks such as kitchen and bathroom cleaning. Ms. Bertolo also observed the Applicant caring for her three year old son. Ms. Bertolo did not find any physical or functional impairment that prevents the Applicant from performing all of her pre-accident self-care tasks.

[26] In the Independent Physiatry Evaluation of Dr. Christos Boulias, Physiatrist, dated March 8, 2016, he notes that he was unable to complete his evaluation, because the Applicant become too emotional. He noted that the Applicant reported that she had to take her son away from playing soccer, because she could not drive him. However, she also reported that she was driving her kids to school daily and that she went to church every day to pray.

[27] In the Independent Psychology Evaluation of Dr. Daniel Cohen, clinical psychologist, dated March 8, 2016, he notes that the Applicant reported to him that prior to the second accident:

- She would prepare meals for the kids, shower then drive them to school.
- She attended mass on a daily basis in the morning.
- She would spend some of her morning playing with her son.
- She would pick up her children from school.
- She stopped driving her children to activities after the first accident.
- She received some help from her mother-in-law with respect to cooking and cleaning chores.
- She is able to independently manage all personal care tasks.
- She is able to make the beds, but requires some assistance with meal preparation and childcare duties.

[28] Dr. Cohen notes that the Applicant reported to him that after the second accident:

- She continues to be independent with personal care tasks.
- She continues to be able to make the beds and prepare meals, but requires some assistance.
- She spends most of her day caring for her three year old son.

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- She visits one of her friends, who sometimes prepare dinner for her and her kids.
- She could not do any housekeeping after the second accident and that her mother-in-law completed all these tasks.
- She continues to drive including on highways.
- She continues to attend church on a daily basis.
- She speaks to her friends on a regular basis about her difficulties.
- She can walk for 30 minutes, sit for 30-45 minutes, stand for 30-45 minutes and drive for 20 minutes.

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[29] Dr. Cohen concludes that the Applicant suffers from Major Depressive Disorder and a Pain Disorder, but she does not suffer from a complete inability to carry on a normal life from a psychological perspective.

[30] Dr. Matthews opines in his two OCF-3s that the Applicant meets the test for a non-earner benefit. However, no further explanation was offered as to how the Applicant met the test and no comparison of her activities pre and post accident was given. Furthermore, the Applicant argues that one of the reasons the Insurer Examinations are deficient is because the assessors did not review Dr. Matthew's clinical notes and records. Despite this argument, the Applicant did not submit these records to support the Applicant's claim for a non-earner benefit.

[31] The only treating record submitted that supports the Applicant's claim for a non-earner benefit is Dr. Shaul's Psychological Report. However, his report was not very specific with respect to the Applicant's activities pre and post accident. There were categorical generalizations made as to what the Applicant did pre-accident and what she cannot do post-accident. For example, Dr. Shaul states in his report that the Applicant is unable to take care of her children and do her housework post-accident. However, Dr. Shaul does not break down the individual tasks that the Applicant did pre-accident that she is no longer able to do post-accident. Furthermore, the activities that Dr. Shaul categorically states that the Applicant cannot do post-accident conflicts with the reports of other assessors.

[32] There are conflicting reports of what the Applicant can and cannot do after the first accident. The Applicant did not adduce any direct evidence to demonstrate what her activities and life circumstances were before the accident. There is no direct comparison of what she could do before the accident and what she could not do after the accident. The Applicant did not adduce any evidence as to what activities and life circumstances were important to her before the accident and how she is prevented from engaging in those activities as a result of her accident-related impairments.

[33] From the evidence before me, it would appear that the Applicant was a homemaker and mother of four before the accident. Post-accident, she continues to be a homemaker and mother of four, albeit with some impairments and

difficulties. Being unable to engage in activities post-accident that you engaged in pre-accident is not determinative of entitlement to a non-earner benefit. The Applicant must prove that she is unable to engage in *substantially* all of her pre-accident activities.

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[34] Post-accident, the Applicant continued to care for her children, drive them to school, cook and clean and perform all of her personal care tasks. I accept that the Applicant does suffer from impairments sustained in the accident that make some of these tasks more difficult and I understand that *Heath* indicates that if the Applicant is experiencing significant restrictions, it may not count as "engaging in" that activity. However, other than her cleaning, the Applicant does not suffer from significant restrictions in her other activities. Even with respect to her cleaning, Ms. Bertolo found that the Applicant is independent with all her personal care and housekeeping tasks except for toilet cleaning. Toilet cleaning is not substantially all of the Applicant's pre-accident activities.

[35] In short, there is not enough evidence about the Applicant's pre-accident and post-accident activities and life circumstances for me to make a finding that the Applicant's accident related injuries prevent her from engaging in substantially all of her pre-accident activities. Therefore, based on the totality of the evidence before me, I find that the Applicant has not proven on a balance of probabilities that she suffers from a complete inability to carry on a normal life.

2. **Rehabilitation Benefit**

[36] Section 14 and 16 of the *Schedule* provides that an insurer is only liable to pay for rehabilitation expenses that are reasonable and necessary. The Applicant has not made any submissions or pointed to any evidence as to why the balance of the partially approved OCF-18 Treatment and Assessment Plan ("treatment plan") dated March 20, 2015 is reasonable and necessary. Therefore, I find that the Applicant has not met her onus of proving that the treatment plan is reasonable and necessary.

[37] The Applicant submits that the Tribunal should award the balance of the treatment plan based on compassionate grounds. "Compassionate grounds" is not a remedy available to the Applicant under the *Schedule* and the Applicant has not pointed to any legislation or jurisprudence that supports this argument. Therefore, I find that the balance of the treatment plan is not payable.

3. **Interest**

[38] There is no evidence before me of any overdue payment of benefits. Since I did not find any benefit to be payable, no interest is applicable. Therefore, the Applicant is not entitled to any interest.

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4. **Costs**

[39] The Applicant requested costs pursuant to section 282(11) of the *Insurance Act.* That section has been repealed. However, the *Rules* include a provision in Rule 19.1 for parties to request costs of the proceeding, if they believe that the other party has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct.

[40] The Respondent objects to the Applicant's request for costs, because the request was not set out in the Case Conference Report of September 26, 2016 and the Applicant did not raise the issue of costs prior to the hearing. While it is true that costs were not requested at the Case Conference and it was not added as an issue, Rule 19.2 allows for a party to make a request for costs at any time before the decision or order is released. Therefore, I will deal with the Applicant's request for costs.

[41] The Applicant has asked for costs of this proceeding, because she alleges that the Respondent unreasonably withheld payment of benefits. However, she has not alleged the Respondent's conduct to be unreasonable, frivolous, vexatious, or in bad faith. Furthermore, she has not set out the reasons for the request or the particulars of the Respondent's conduct. Therefore, she has failed to meet the threshold and requirements for costs set out in Rule 19.

[42] The purpose of Rule 19.1 is clear: to compensate for and deter conduct by parties that is unreasonable, frivolous, vexatious, or in bad faith. This is a high bar for conduct to attract a cost award, and an exceptional remedy. There is insufficient evidence of conduct that is unreasonable, frivolous, vexatious, or in bad faith before me, so I cannot make an order for costs in this matter. Therefore, no costs will be awarded.

5. **Special Award**

[43] The Applicant requested a special award pursuant to section 282(10) of the *Insurance Act.* This section has also been repealed and the *Rules* do not contain a provision for a special award. However, the Respondent raised section 10 of Ontario Regulation 664 ("Reg 664"), which has almost identical language, so I will deal with the Applicant's request for a "special award" under Reg 664.

[44] Section 10 of Reg 664 states that an amount of up to 50 per cent with interest on all amounts owing may be awarded if an insurer has unreasonably withheld or delayed payments. Since I found nothing payable, the Respondent cannot have unreasonably withheld or delayed payments. As such, no award under Reg 664 will be granted.

CONCLUSION

[45] For the reasons outlined above, I find that:

1. The Applicant is not entitled to a non-earner benefit in the amount of $185 per week from July 3, 2015 to present.

2. The Applicant is not entitled to a rehabilitation benefit in the amount of $147, being the balance of a partially approved OCF-18 Treatment and Assessment Plan dated March 20, 2015 by Bloor West Therapy Orthopaedic & Sports Medical Centre.

3. The Applicant is not entitled to any interest.

4. The Applicant is not entitled to costs of the proceeding.

5. The Applicant is not entitled to a “special award”.

Released: January 24, 2017

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Anna Truong, Adjudicator

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