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: 2017-12-21
Tribunal File Number: 17-001552/AABS
Case Name: 17-001552 v TD Insurance Meloche Monnex

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. T.

Applicant

and

TD Insurance Meloche Monnex

Respondent

DECISION

ADJUDICATOR: **Rupinder Hans**

APPEARANCES:

For the Applicant: Paljinder S. Mahaar, Counsel
For the Respondent: Jennifer Sweitzer, Counsel
A. Sandy Williams

Heard in writing: **July 18, 2017**

OVERVIEW

[1] On March 1, 2015, the applicant, M. T., was injured in a motor vehicle accident, and sustained injuries as a result. About five months later, on August 19, 2015, the applicant was involved in another motor vehicle accident causing injuries (the "second accident"). The second accident is not the subject of this application, but is discussed by both parties in their respective submissions.

[2] The applicant applied for and received benefits under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*"). The respondent, TD General Insurance Company, initially paid for benefits, but denied payment for two prescription medications. The denial was based upon the respondent's position that the applicant's injuries were predominately minor injuries, and thus, treatment of them fell within the *Minor Injury Guideline* (the "*Guideline*"), as defined in subsection 3(1) of the *Schedule*. The applicant has exhausted the maximum payable under the *Guideline*.

[3] The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal"), pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act"), seeking approval of the medical benefits, interest on the outstanding benefits, and a determination that his entitlement to benefits is not subject to the *Guideline.*

[4] This matter was heard in writing with written submissions.[1]

ISSUES IN DISPUTE

[5] The following issues are in dispute:

(1) Do the applicant's injuries fall within the *Guideline*?

(2) Is the applicant entitled to payment for prescription medications in the amount of $43.84, submitted by the applicant on August 11, 2016, and denied by the respondent on August 16, 2016?

(3) Is the applicant entitled to payment for prescription medications in the amount of $13.92, submitted by the applicant on September 6, 2016, and denied by the respondent on October 14, 2016?

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

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[1] I note that the Order of Adjudicator Markovits sets out a 10 page limit on submissions. The respondent points out that the applicant has exceed the limit by 6 pages. The applicant counters that the respondent did not double space its submission as required. I have exercised my discretion and reviewed all the materials, including the correspondence from the respondent dated July 11, 2017.

(5) Is the respondent entitled to costs of the hearing?

RESULT

[6] Based upon a review of the evidence and submissions, I find that the applicant's injuries fall within the *Guideline*, and thus, the medical benefits sought are not payable as the applicant has exhausted the amounts payable under the *Guideline*. There is no interest owing. The respondent is not entitled to costs.

DISCUSSION

[7] I will discuss, first, the applicability of the *Guideline* because it would be a barrier to the payment for the prescription medications; second, the applicant's entitlement to the medical benefits sought and interest.

Issue 1: The Applicability of the *Guideline*

[8] I find that the applicant suffers from physical injuries as a result of the motor vehicle accident that are predominately minor, and his entitlement to benefits is therefore subject to the *Guideline*.

[9] The *Guideline* establishes a framework for the treatment of minor injuries. The term "minor injury" is defined in subsection 3(1) of the *Schedule* 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." The terms "sprain", "strain", "subluxation", and "whiplash associated disorder" are also defined in subsection 3(1). Subsection 18(1) of the *Schedule* limits recovery for medical and rehabilitation benefits for such injuries at a cap of $3,500.00, if the insured person sustains an impairment that is predominantly a minor injury in accordance with the *Guideline*.

[10] Section 18(2) of the *Schedule* provides that an applicant can be taken out of the *Guideline* if the insured person provides compelling evidence that they have "a pre-existing medical condition" that will prevent the insured from achieving maximal recovery from the minor injury.

[11] The respondent argues that the applicant's injuries are properly considered minor. In this regard, the respondent relies on the decision of *Scarlett v. Belair Insurance*, 2015 ONSC 3635 (CanLII) ("*Scarlett*"). In that case, the Divisional Court reviewed the minor injury provisions in the *Schedule*, and found that they were a limit on an insurer's liability, but not an exclusion from coverage, and thus the onus of establishing entitlement beyond the $3,500.00 limit rests with the claimant. I agree. Applying *Scarlett*, the onus is on the applicant to prove that his entitlement to medical benefits is not subject to the *Guideline,* and its prescribed $3,500.00 limit for minor injuries.

Pre-existing Condition and Causation

[12] The applicant has insufficient evidence to establish that he had a pre-existing condition that would render him unable to achieve maximal medical recovery under the *Guideline*, or that he sustained anything other than soft tissue injuries from the accident.

[13] To meet his burden and establish that he had a pre-existing condition, the applicant submits that he suffered from low back pain prior to the accident. He states that the low back pain dates back to a 2007 motor vehicle accident, and was exacerbated as a result of March 1, 2015 accident. In support of this position, the applicant provides: (1) a March 31, 2014 note from Dr. Lorne Sokol; (2) a March 31, 2014 x-ray report of the applicant's lumbar spine; and (3) an OHIP summary from April 1, 2007 to September 16, 2015. There are no additional medical records provided between 2007 and the accident.

[14] The March 31, 2014 note from Dr. Lorne Sokol indicates that the applicant visited him with regards to low back pain. The March 31, 2014 x-ray report of his lumbar spine states "alignment is normal" and there is "slight narrowing of the posterior disc spaces from L3 to S1 but no other degenerative endplate changes or other bony changes of degenerative disc disease." This report is one year pre-accident.

[15] With regards to the OHIP summary, the applicant does not point to any particular dates for doctor's visits wherein the applicant sought treatment for low back pain. The respondent points out that the OHIP summary indicates that there was only one notation indicating a visit for back pain. The applicant does little to counter this assertion. The applicant did not provide any additional clinical notes and records, other than Dr. Sokol's note dated March 31, 2014, showing visits to medical providers seeking treatment for low back pain.

[16] The remaining medical and imaging records provided by the applicant are dated after the second accident, which occurred more than five months after the accident. The second accident involved a tire dislodging from a tractor trailer and striking the vehicle that the applicant was driving. The applicant was taken out of the *Guideline* with regards to the second accident, and continues to be entitled to medical benefits from that accident. The respondent states that any evidence of a pre-existing medical condition needs to be documented before the first accident for an exemption from the *Guideline*. The respondent is correct.

[17] The medical records dated after the second accident are extensive and include: clinical notes and records of Dr. Manfred Anderson, a thoracic spine MRI report dated September 16, 2015, a lumbar spine MRI report dated September 16, 2015, an OCF-3 dated October 15, 2015 by Dr. Anderson, spine x-ray report dated July 19, 2016, a lumbar spine MRI report dated March 16, 2017, clinical notes and records from Cooksville Rehabilitation Clinic, and the Physiatry

Assessment Report of Dr. Ali T. Ghouse dated May 17, 2017.[2] The results of the post-second accident imaging of Sept 16, 2015, July 19, 2016, and March 16, 2017, make note of mild degenerative changes in the spine (sclerosis).

[18] The applicant points to an October 19, 2015 notation (post-second accident) from the records of his current family doctor, Dr. Anderson, wherein it states that the applicant was involved in a serious motor vehicle accident in 2007 that it is "possible" it caused a compression fracture to the lumbar spine. No medical evidence has been provided to the Tribunal to demonstrate a compression fracture from the 2007 accident. None of the reports provided by the Applicant, including those dated March 31, 2014, September 16, 2015, July 19, 2016 and March 16, 2017, provide evidence of a fracture that the applicant may have sustained in 2007. No contemporaneous medical notes and records, or imaging are provided. I also note that Dr. Anderson was not the applicant's treating physician in 2007.

[19] To counter, the respondent points to the treatment confirmation form (OCF-23), dated March 4, 2015, prepared by the applicant's treating chiropractor, Dr. Jason Lozanovski, wherein he indicated that the applicant does not have any pre-existing issues that could affect his response to treatment. He further describes the applicant's injuries as "sprain and strain of lumbar spine" and "whiplash associated disorder [WAD2] with complaint of neck and pain with musculoskeletal signs" with no barriers to recovery. The respondent asserts that these medical records indicate no more than soft tissue minor injuries that are treatable within the *Guideline*. I agree with the respondent that the medical evidence prior to the second accident indicates no pre-existing condition that would be a barrier to recovery, or that the applicant suffered anything other than soft tissue injuries from the first accident.

[20] Dr. Lozanovski also completed the Disability Certificate, dated March 4, 2015, wherein he lists the applicant's injuries as "low back strain" and "neck strain," and opines that the applicant has "minor injury of tissues."

[21] In his reply, the applicant points out that the MRI dated September 16, 2015 was requisitioned by Dr. Beretta prior to the second accident, and that she must have felt a strong need for an MRI. Nonetheless, the MRI was conducted after the second accident. The MRI is objective evidence of the applicant's condition at the time of the MRI, and in this case, post-second accident. As such, the MRI does not assist the applicant in establishing that he sustained injuries from the accident that are not minor.

[22] The respondent asserts that only after the second accident, did the applicant undergo imaging that could possibly take the applicant out of the *Guideline*. The respondent notes the application of *Blake v. Dominion*, [3] wherein the Court of Appeals confirmed that there is no difference in approach in determining

[2] The respondent asserts that I should exclude Dr. Ghouse's report, the police report, and the property damage file from consideration as the applicant failed to disclose these documents in the case conference summary as required by Rule 20.4 of the *LAT Rules of Practice and Procedure*. I note that these documents were disclosed on June 14, 2017, more than 30 days prior to the written hearing. They are compliant with Rule 9.2, and as such, I have considered the materials.

[3] *Blake v. Dominion of Canada*, (2015) ONCA 165 (OCA) at paras. 71, 72

causation in accident benefit cases. The "but for" test/approach as set forth by the Supreme Court in *Clements v. Clements*[4] applies. I agree that the "but for" test applies.

[23] In order to establish that the accident caused him injuries that should be out of the *Guideline*, the applicant also relied upon the Physiatry Assessment Report of Dr. Ali T. Ghouse dated May 17, 2017, dated post-second accident, wherein he states that the applicant's current symptoms of back pain and right sciatica and right hand numbness are continuous, and "directly related to the two indexed motor vehicle accidents." The respondent submits that a blanket statement that the injuries are directly related to the two accidents does not aid the applicant in meeting his burden for this accident. The injuries resulting from the second accident are not relevant, nor should they be taken into account in aiding the applicant in meeting his burden. The respondent states that for this reason, I should give the report little weight. I am persuaded by the respondent's argument in that the report does not establish that the applicant's injuries at the time of the examination were the result of the first accident. Dr. Ghouse examined the applicant after the March 1, 2015 accident and the second accident, and the applicant's medical condition at that time, was a result of both accidents. Dr. Grouse's report may have assisted the applicant, but for the intervening second accident.

[24] The respondent further asserts that no medical opinion has been provided indicating that the applicant would be unable to achieve maximal medical recovery under the *Guideline*.

[25] I agree with the respondent's position. I find that the applicant has failed to meet his burden and provide sufficient medical evidence to establish a pre-existing condition that would be a barrier, or that he sustained anything other than soft tissue injuries from the first accident. I do not find that the notation by Dr. Sokol regarding low back pain, and an x-ray are persuasive evidence. Dr. Anderson's October 19, 2015, post-second accident, notation regarding a possible 2007 fracture is similarly not compelling for the reasons set forth above. There are no further compelling medical records indicating that the applicant was receiving ongoing medical treatment for pain to his low back prior to the accident. I also note that the applicant's own expert Dr. Ghouse states that the applicant reported "having made a full recovery" from 2007 accident.

[26] The bulk of the medical evidence provided, including the notes and records of Dr. Anderson, are dated after the second accident, and may take the applicant out of the *Guideline* with regards to the second accident, but that issue is not before the Tribunal. The relevant time period for the analysis is from the time of the accident until the date of the second accident, an approximate five month period. I am mindful that the applicant has suffered two accidents in a relatively short time frame, and he suffered injuries. Nonetheless, my analysis can only focus on the first accident, and not the second accident.

[27] I find that there is insufficient evidence provided to demonstrate a pre-existing condition that would prevent the insured from achieving maximal recovery within

[4] *Clements v. Clements*, [2012] 2 SCR 181

the *Guideline* with regards to the March 1, 2015 accident, or that the applicant sustained anything other than soft tissue injuries from that accident.

[28] Given the above, and the application of *Scarlett* and *Blake*, I find that the applicant's injuries are minor, and therefore fall within the *Guideline*.

Issues 2 to 4: The applicant entitlement to the medical benefits and interest

[29] As I have found that the applicant injuries fall within the *Guideline*, the medical benefits for payment of the two prescriptions in the amounts of $13.92 and $43.84 are not payable.

[30] No interest is owed.

Issue 5: The respondent entitlement to costs of the hearing

[31] In its submissions, the respondent lists costs of the hearing as relief sought, but provides no cost submissions whatsoever. There is no evidence that the applicant's conduct rises to the level of unreasonable, frivolous, vexatious, or in bad faith. The respondent has clearly not met its burden in this regard.

[32] I am not ordering costs.

ORDER

[33] After considering the evidence, pursuant to the authority vested in this Tribunal under the provisions of the Act, I order that:

a. The applicant's injuries fall within the *Guideline.*
b. The applicant is not entitled to the medical benefits.
c. The applicant is not entitled to interest.
d. The respondent is not entitled to costs.

Released: December 21, 2017

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Rupinder Hans, Adjudicator