Citation: Green v. Intact Insurance Company, 2021 ONLAT 19-013031/AABS-A

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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:

Mark Green

Applicant

and

Intact Insurance Company

Respondent

AMENDED DECISION AND ORDER

ADJUDICATOR: **Theresa McGee, Vice-Chair**

APPEARANCES:

For the Applicant: Shah Tamur, Counsel

For the Respondent: A. Sandy Williams, Counsel
Geoffrey Yu, Counsel

HEARD: **By way of written submissions**

REASONS FOR DECISION

OVERVIEW

[1] The applicant, Mark Green, was involved in an automobile accident on March 29, 2016, and sought benefits from the respondent, Intact Insurance Company, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*[1] (the "*Schedule*").

[2] The respondent paid the applicant an income replacement benefit but terminated the benefit as of September 2, 2019 after determining that the applicant did not meet the test for post-104 week entitlement. The applicant then claimed the cost of a multidisciplinary report to rebut the respondent's income replacement benefit determination, which the respondent denied. The applicant then applied to the Licence Appeal Tribunal ("Tribunal") for resolution of the dispute.

ISSUE

[3] The issue to be decided in this hearing is:

a. Is the applicant entitled to $10,200.00 for an income replacement benefit multidisciplinary report, recommended by Dr. Maano in a treatment plan (OCF-18) dated September 30, 2019?

RESULT

[4] The *Schedule* does not provide for funding of the disputed multidisciplinary report. It is not necessary to consider the applicant's submissions about the reasonableness and necessity of the reports. The respondent is not liable for the cost of the assessment. The application is dismissed.

ANALYSIS

[5] This is not a dispute over the applicant's ongoing entitlement to an income replacement benefit. The sole issue to be determined is whether the applicant is entitled to the cost of a multidisciplinary report ("the disputed report") rebutting the respondent's determination on his entitlement to an income replacement benefit.

[6] Because the dispute hinges on whether the *Schedule* obliges the respondent to fund the disputed report, it will only be necessary to engage in an in-depth

[1] O. Reg. 34/10.

analysis of the medical evidence if I accept the applicant's position on this threshold question. It will also be unnecessary to consider whether the cost of the report should be deducted from the medical and rehabilitation benefit funds under s. 18(3) of the *Schedule*. If the respondent is correct that the disputed report is not payable, this will end the analysis.

[7] The applicant submits that, as a matter of procedural fairness, he is entitled to be assessed for an income replacement benefit by the assessors of his choice. He relies on the Divisional Court's decision in *Certas v. Gonsalves* ("*Gonsalves*")[2] as support for his submission that a party must be given an equal opportunity to respond to the position taken against it because that is what procedural fairness dictates. He also submits that he has a substantive right to combat the opinions of the respondent's experts under s. 25 of the *Schedule*.

[8] The respondent submits that there is no entitlement to rebuttal reports for an income replacement benefit determination under the *Schedule*. It submits that the applicant's procedural fairness arguments fail to translate to this case.

[9] I agree with the respondent.

[10] The applicant's procedural fairness argument conflates the common law duty owed by the Tribunal to participants in its adjudicative process with the statutory obligations between parties to a proceeding under s. 280 of the *Insurance Act*.[3] In *Gonsalves*, the court restored an arbitrator's decision to adjourn a matter to allow an insurer time to respond to an insured's late-filed expert reports. That case concerned steps taken in the decision-making process. It does not stand for the proposition advanced by the applicant.

[11] The common law duty of procedural fairness is one that is owed by an administrative decision-maker to participants in the decision-making process. It is a set of participatory rights which aim to ensure that administrative decisions are made using a fair and open procedure.[4] *Gonsalves* was about an adjournment granted to allow a party to marshal responsive evidence and fairly participate in litigation. *Gonsalves* is not authority for an administrative decision-maker compelling one party in a dispute to assume costs associated with the litigation on another party's behalf.

[2] 2011 ONSC 3986 at para. 3.
[3] RSO 1990 c. I.8.
[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 22.

[12] Ordering the respondent to pay the cost of the disputed report would not be a procedural order but a substantive one, and the Tribunal must look to the provisions of the *Schedule* for the authority to make such a substantive order.

[13] Section 25 of the *Schedule* lists examinations or assessments an insurer is obligated to fund. The applicant asks the Tribunal to expand the meaning of s. 25(1)5, which applies to reasonable fees charged for preparing an application for a catastrophic impairment under s. 45, to include the disputed report, which relates to post-104 week entitlement to an income replacement benefit. The applicant submits that the disputed report should be no different than a report prepared under s. 45. He submits that it is only fair for the respondent to fund these reports.

[14] The respondent submits that s. 25 entrenches a right to insurer-funded catastrophic impairment reports. It submits that no similar right exists for non-catastrophic benefits. It submits that the 2010 amendments to the *Schedule* did away with funding for so-called rebuttal reports to remove excess costs from the automobile insurance system.

[15] Section 25(1)5 plainly requires insurers to pay "reasonable fees charged for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment…". To extend this provision to the disputed report would exceed the plain meaning of the provision read in the context of the *Schedule* as a whole and the overarching purpose of the statutory accident benefits scheme.

[16] The plain meaning of the provision is clear: it refers to costs associated with an application for catastrophic impairment determination. It does not refer to income replacement benefit reports. The text of the full provision also militates against the interpretation the applicant suggests. Section 25(1) requires insurers to pay reasonable fees charged for preparing a disability certificate in relation to a claim for income replacement benefits. This shows that the legislature contemplated the fees it intended insurers to fund in relation to applications for income replacement benefits, and it deliberately did not extend that coverage to reports such as the one in dispute.

[17] Section 7(4) of the *Schedule* also provides for funding associated with determining income replacement benefit entitlement. That section requires, under certain circumstances, an insurer to pay for the preparation of a report for the purpose of calculating the quantum of the benefit. Again, the costs associated with an application for income replacement benefits that the legislature intended insurers to bear are already addressed in the *Schedule*.

[18] The *Schedule* provides a complete scheme for an insurer's liability for costs associated with income replacement benefit determinations. Controlling costs to the automobile insurance system is consistent with the *Schedule*'s consumer protection purpose. Nothing in s. 25(1)5 permits the Tribunal to order the respondent to pay for the disputed report.

[19] For these reasons, the respondent is not required to pay the cost of the disputed report. There is no need to determine whether the cost of the report should come from the medical and rehabilitation benefit limit, or whether the disputed report is reasonable and necessary because of the applicant's accident-related impairment. The application is dismissed.

CONCLUSION

[20] The applicant is not entitled to the cost of the disputed report. The application is dismissed.

Released: June 4, 2021

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Theresa McGee
Vice-Chair