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

Tribunal File Number: 16-003776/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:

N. R.

Applicant

and

Pembridge Insurance Company

Respondent

DECISION AND ORDER

Adjudicator: **Rupinder Hans**

Appearances:

For the Applicant: **Nisarg Munshi, Counsel**
For the Respondent: **Cary N. Schneider, Counsel**

Heard in writing: **June 19, 2017**

OVERVIEW

[1] The applicant, N. R., was injured in a motor vehicle accident on March 21, 2013 when a third party made a left turn in front of his vehicle leading to a collision.

[2] The applicant applied for and received an attendant care benefit under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*") from the respondent, Pembridge Insurance Company. The applicant is appealing the stoppage of the attendant care benefit, and denials of a non-earner benefit, and medical benefits for dental services, and a TMJ assessment.

[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").

[4] This matter was heard in writing with written submissions due by April 27, 2017. Accordingly, this decision is based upon my review of the parties' evidence and written submissions.

ISSUES IN DISPUTE

[5] The following issues are in dispute:

(1) Is the applicant entitled to a non-earner benefit in the amount of $185.00 per week from July 20, 2014, to date and ongoing?

(2) Is the applicant entitled to an attendant care benefit in the amount of $787.26 per month, from March 3, 2013, to March 31, 2017?[1]

(3) Is the applicant entitled to a medical benefit in the amount of $20,524.00 for dental services?

(4) Is the applicant entitled to a medical benefit in the amount of $3,938.72 for a TMJ assessment?

RESULT

[6] Based upon a review of the evidence and submissions presented, the appeal is denied on all four issues.

[1] I note that the Order of the Tribunal dated February 1, 2017, states that the time period is March 3, 2013 to March 20, 2013. However, the parties submissions extend the time period to March 31, 2017, and thus, I have accepted that date for purposes of this decision.

DISCUSSION

[7] I will discuss, first, the entitlement to a non-earner benefit; second, the applicant's entitlement to an attendant care benefit; and third, the entitlement to the medical benefits sought for dental services and a TMJ assessment.

Procedural Issues

[8] There are two procedural issues that I must first discuss prior to the substance of the claim.

[9] First, the applicant objects to the length of the respondent's submissions as non-compliant with the Tribunal's Order dated February 21, 2017. The applicant asserts that the respondent's submissions exceed the page limit of 20 pages, and are less than double spaced. It would appear that the respondent's submissions are less than double spaced, and more than single space. The substance of the submissions appears to be about 19 pages in length. I note my disappointment in this regard, and expect that in the future counsel will comply with the Tribunal's Order. While I acknowledge the applicant's point, I do not see any prejudice that flows from the respondent's non-compliance. The applicant is unable to express any in the submissions.

[10] Second, the applicant asserts that it has submitted affidavit evidence in compliance with the Tribunal's Order, and that the respondent is asserting that this evidence should be given little weight, or not considered at all. The format of the hearing is a written hearing, as agreed to by the parties, and as such, I will be giving due weight to the affidavit evidence.

Substantive Issues

Issue 1: Entitlement to a Non-Earner Benefit

[11] Section 12 of the *Schedule* provides that the applicant must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident in order to be entitled to a non-earner benefit.

[12] The leading case with respect to proving entitlement to a non-earner benefit, which both parties rely on, establishes that a claimant must be able to prove that he has been continuously prevented from engaging in "substantially all" of the activities in which he engaged in before the accident.[2]

[13] It is not disputed that the applicant had severe lumbar problems prior to the accident. In fact, the applicant asserts that he was diagnosed in 2008 with multilevel disc herniation with stenosis. In February 2010, he was involved in a

[2] *Heath v. Economical*, 95 O.R. (3d) 785

motor vehicle accident that left him unable to work. A MRI conducted in July 2011 states, among other things: at the L4-L5 level: moderate spinal stenosis; at the L5-S1 level: mild spinal stenosis.

[14] However, the applicant purports that this lower back condition was stable before the accident, and aggravated by the accident. He points to a September 21, 2015 CT scan report that states that the L4-L5 level, the spinal stenosis had "worsened since the prior study." He further relies on the November 26, 2015 MRI report which states there is "severe" spinal stenosis. On February 11, 2016, the applicant underwent a discotomy. He has also experience a left foot drop that has persisted.

[15] The applicant relies on the clinical notes and records of his treating family physician Dr. Andrei Tchernov. On March 26, 2013, Dr. Tchernov makes note that the applicant "has a history of severe spinal problems as well as spinal stenosis."[3] He further notes at present the applicant is complaining of: severe exacerbation of low back pain, severe; bilateral pain in the knees, facial discomfort and TMJ pain bilaterally. TMJ means temporomandibular joint which is a hinge that connects the jaw to the temporal bones of the skull. The applicant's affidavit evidence provides a further overview of his ailments and injuries.

[16] While a list of ailments is helpful, in order to find that the applicant is entitled to a non-earner benefit, I require evidence of his life before the accident as a baseline so that I can compare it to his life after the accident. In his affidavit, and his wife's affidavit, the applicant has failed to provide a pre-accident baseline. For instance, the affidavit of the applicant's wife provides details on what the applicant cannot do since the accident, but does not contain sufficient details as to what pre-accident activities he could engage in. The evidence provided is lacking in detail and specificity.

[17] The respondent correctly points out that the applicant has not provided baseline activities that he was able to engage in prior to the accident.

[18] The respondent provides the reports of Dr. E. P. Urovitz, orthopaedic surgeon, dated June 17, 2014, and Dr. Kelly McCutcheon, psychologist, dated July 3, 2014, in support of its position that a non-earner benefit is not payable. I have reviewed the reports, but they do not form the basis for my analysis which is based on the fact that the applicant's own submissions and evidence do not meet his onus.

[19] What is missing from the applicant's submissions and evidence is a thorough analysis with respect to the activities the applicant could engage in prior to the accident in comparison to what he can do post-accident. It is not possible to assess whether the applicant is prevented in engaging in substantially all of the pre-accident activities that he ordinarily engaged in without such information.

[20] In order to qualify for a non-earner benefit, it is not sufficient for the applicant to demonstrate that he sustained injuries from the accident, that he suffers from pain

[3] Applicant's Initial Submissions, Affidavit of the applicant, Tab 3.

in his lumbar spine or has to wear dentures, or that his pre-existing injuries have been exacerbated. What must be proven is that the injuries and associated pain were directly caused by the March 21, 2013 accident, and have significantly interfered with substantially all of the applicant's daily pre-accident activities.

[21] The applicant has been a victim of two motor vehicle accidents which had a serious impact on his life, however, he has not demonstrated that he has suffered a complete inability to carry on a normal life as a result of the March 21, 2013 accident. The applicant has not meet his burden, and is thus, not entitled to a non-earner benefit.

Issue 2: Entitlement to an Attendant Care Benefit

[22] As set forth in section 19(1)(a) of the *Schedule*, an applicant is entitled to all reasonable and necessary expenses incurred as a result of the accident for services provided by an aide or attendant. A prerequisite to entitlement is that the expense is "incurred."

[23] Section 3(7)(e) of the *Schedule* sets out the definition of "incurred" that is relevant in the appeal, and states that an expense is not incurred unless:

> (i) the insured person has received the goods and services to which the expense relates,
>
> (ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and
>
> (iii) the person who provided the goods or services,
>
> (A) did so in the course of employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or
>
> (B) sustained an economic loss as a result of providing the goods or services to the insured person.

[24] The *Schedule* authorizes attendant benefits to pay for reasonable and necessary expenses incurred to hire someone to assist with self-care activities that an insured person is unable to perform as a result of the accident related injuries. These activities can include, bathing, assistance with dressing, hygiene, grooming, feeding, and assistance with ambulating.

[25] On July 11, 2013, Ashok Jain, an occupational therapist, assessed the applicant and prepared the Assessment of Attendant Care Needs. He concluded that the applicant would require assistance with his personal care tasks. Consequently, the applicant was paid an attendant care benefit until August 31, 2013.

[26] On July 2, 2014, after an Insurer's Examination, a new Form 1 was completed by Starr Robinson, occupational therapist, who concluded that the applicant does not require any attendant care to complete his personal care duties. As a result, the respondent terminated the benefit.

[27] Despite the denial, the applicant retained the services of a personal support care worker to whom he purportedly paid a flat rate for the services. In this regard, the applicant provides nine expense sheets for attendant care and personal assistance services, all dated April 24, 2017 (collectively the "Expense Sheets"), and covering the period from July 1, 2014 to March 31, 2017. Each Expense Sheet covers several months in duration, and the amounts paid range anywhere from $300.00 per month to $800.00. In his submissions, the applicant states that the Expense Sheets were not obtained contemporaneously, instead they were generated later based upon the records that he kept for the amounts paid.

[28] The respondent disputes the content of the Expense Sheets, stating that they are boilerplate documents filled-in more than four years post-accident, and the alleged services provided are vague in description. The respondent points to the fact that all the Expense Sheets are all dated the same day. The respondent asserts that they should be disregarded, and that the applicant's reliance on them is disingenuous.

[29] I note that the Expense Sheets lack specificity or details as to the exact days worked per month, or the number of hours worked per day or even per month. There are no time dockets, daily logs, job diary, or dates and times that the services were performed by the personal support care worker. Further, there is insufficient information on the level of care provided. Instead, each Expense Sheet covers several months in duration. The affidavits of the applicant and his spouse similarly provide no detail as to the amount of assistance provided by the personal support care worker, or the number of hours worked per week or month. It is troubling that the Expense Sheets are not contemporaneous, and are instead generated based upon the applicant's records. The applicant provided no other convincing evidence that the expenses were incurred as claimed to support his application for attendant care benefits. Given the above, I agree with the respondent and find that the evidence presented does not support a finding that the attendant care services were incurred. I simply cannot rely upon the Expense Sheets evidence as presented.

[30] I conclude that the applicant is not entitled to attendant care benefits claimed because he has not proven on a balance of the probabilities that he incurred the expenses as required by the *Schedule*.

Issues 3 & 4: Entitlement to Medical Benefits

[31] The applicant submits that he is entitled to a medical benefit in the amount of $20,524.00 for dental services recommended by Dr. Nana Sogomonian. He further seeks the amount of $3,938.72 for a TMJ assessment as set forth in the Treatment and Assessment Plan, dated June 5, 2014 and recommended by Dr. Richard Goodfellow.

[32] In order to find in favour of the applicant, I must be satisfied that the applicant has proven on a balance of the probabilities that the treatment plans are reasonable and necessary.

[33] In support, the applicant states that he had no complaints related to his TMJ or teeth prior to the accident, and that the problem resulted after being struck in the face by an airbag deployed from his vehicle. The applicant points out that following the accident, on March 26, 2013, Dr. Tchernov makes a notation that the applicant is complaining of facial discomfort and TMJ pain bilaterally. He further relies upon the September 13, 2013 notes from Dr. Karlin's office wherein he was examined for loose dental bridges. Dr. Karlin notes that the applicant's bridges have become loose, and he recommends removal of the bridges followed by dentures or implants. The applicant has since such time removed the teeth and opted to wear dentures. Dr. Goodfellow also makes notations as to the applicant experiencing jaw inflammation, throat pain and jaw dislocation.

[34] In response, the respondent states that the clinical note from Dr. Karlin is not a record of dental work being performed, and its significance is questionable. Moreover, Dr. Karlin's note is about six months after the accident, and is not contemporaneous. The respondent states that during that six month period, there is no mention of any dental or TMJ complaints from the applicant. Furthermore, the respondent asserts that Dr. Karlin does not state that the loose bridges are the result of the accident.

[35] The respondent relies upon the section 44 Independent Dental Examination of Dr. John H. Gryfe, oral and maxillofacial surgeon, dated August 21, 2014, and Dr. Gryfe's Independent Oral and Maxillofacial File Review, dated July 17, 2015. After thorough examination, Dr. Gryfe states that there is no evidence of a direct injury from the motor vehicle accident to either or both temporomandibular joints, or to any of the applicant's dentition. He opines that there is no clinical evidence of the presence of temporomandibular joint disorders, nor dental injury or abnormal masticatory function, including parafunction and traumatic masticatory injury to intraoral soft tissues, having resulted from the accident.

[36] I agree with the respondent's position. I find that there is insufficient medical documentation or evidence provided to establish a causal link between the applicant's TMJ and teeth, and the accident. The applicant has not provided relevant evidence to demonstrate why the treatments are reasonable and necessary. Dr. Tchernov's March 26, 2013 note is not sufficient on its own to

establish why the treatment sought is reasonable or necessary. Dr. Karlin's notation similarly does not assist the applicant in meeting his burden.

[37] Based upon the totality of the evidence before me, I find that the treatment plans are not reasonable and necessary.

ORDER

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

a. The applicant is not entitled to a non-earner benefit in the amount of $185.00 per week from July 20, 2014, to date and ongoing.

b. The applicant is not entitled to an attendant care benefit in the amount of $787.26 per month, from March 3, 2013, to March 31, 2017.

c. The following medical expenses are not reasonable and necessary:

   i. $20,524.00 for dental services; and
   ii. $3,938.72 for a TMJ assessment.

Released: December 12, 2017

Rupinder Hans, Adjudicator