Tribunals Ontario
Licence Appeal Tribunal

Tribunaux décisionnels Ontario
Tribunal d'appel en matière de permis

2023 CanLII 65747 (ON LAT)

Citation: Mitchell v. Allstate Insurance, 2023 ONLAT 20-001371/AABS

Licence Appeal Tribunal File Number: 20-001371/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:

Jordon Mitchell

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR: **Brian Norris**

APPEARANCES:

For the Applicant: Swetlana Vinokur, Paralegal

For the Respondent: Kamil Podleszanski, Counsel
Peter Yoo, Counsel

HEARD: By way of written submissions

OVERVIEW

[1] Jordan Mitchell ("the Applicant") was involved in an automobile accident on November 11, 2018 and sought benefits from Allstate Insurance ("the Respondent") pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The Applicant was denied benefits by the Respondent and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues to be decided in the hearing are:

1. Are the Applicant's injuries predominantly a minor injury as defined in section 3 of the *Schedule* and therefore subject to treatment within the Minor Injury Guideline ("MIG") and the $3,500.00 funding limit for minor injuries?

2. Is the Applicant entitled to an income replacement benefit in the amount of $400.00 per week for the period from July 1, 2020 to November 2, 2020?

3. Is the Applicant entitled to a medical benefit in the amount of $2,000.00 for psychological treatment proposed by Knead Wellness in a treatment plan/OCF-18 ("plan") dated February 20, 2019?

4. Is the Applicant entitled to a medical benefit in the amount of $2,500.00 for physiotherapy proposed by Knead Wellness in a plan dated March 7, 2019?

5. Is the Applicant entitled to a medical benefit in the amount of $2,560.00 for physiotherapy proposed by Knead Wellness in a plan dated May 16, 2019?

6. Is the Applicant entitled to a medical benefit in the amount of $4,534.77 for psychological treatment proposed by Knead Wellness in a plan dated June 10, 2019?

7. Is the Applicant entitled to a medical benefit in the amount of $2,510.00 for physiotherapy proposed by Knead Wellness in a plan dated August 27, 2019?

8. Is the Applicant entitled to a medical benefit in the amount of $2,450.00 for physiotherapy proposed by Knead Wellness in a plan dated November 20, 2019?

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9. Is the Applicant entitled to a medical benefit in the amount of $2,000.00 for goods and services proposed by Knead Wellness in a plan dated September 30, 2019?
10. Is the Applicant entitled to a medical benefit in the amount of $10,125.94 for goods and services proposed by Knead Wellness in a plan dated January 22, 2020?
11. Is the Respondent liable to pay an award under section 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the Applicant?
12. Is the applicant entitled to interest on any overdue payment of benefits?

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RESULT

[3] I find that the Applicant sustained a predominantly minor injury as a result of the subject accident. He is not entitled to the plans in dispute because they propose goods and services that fall outside the MIG and the $3,500.00 funding limit on treatment.

[4] The Applicant is not entitled to IRBs for the period claimed.

[5] No interest and no award are payable.

BACKGROUND

[6] The Applicant was the driver of a vehicle which struck the rear end of another vehicle on an urban roadway. Police and ambulance attended at the scene of the accident, but the Applicant sought no medical attention at the time. He met with his family physician, Dr. J. Skeete on November 13, 2018, two days after the accident and complained of pain in his left leg and aggravated back pain. Dr. Skeete examined the Applicant and noted he exhibited normal range of motion (“ROM”), gait, and transfers and diagnosed him with muscle contusions.

[7] The Respondent characterized the Applicant’s injuries as being a predominantly minor injury and subjected him to the MIG and the $3,500.00 funding limit on treatment for a minor injury. He submits that he should not be subject to the MIG due to pre-existing health conditions, because he sustained neurological and psychological injuries, and developed chronic pain.

[8] Additionally, although the Applicant returned to work following the accident, he submits that his accident-related injuries later prevented him from working. As a result, he claims entitlement to IRBs.

[9] The Respondent disagrees and submits that the Applicant has failed to meet his onus to demonstrate that his accident-related injuries are not captured within the minor injury definition or that he is entitled to IRBs or the medical and rehabilitation benefits claimed. I agree with the respondent.

ANALYSIS

Minor Injury Guideline ("MIG")

[10] The MIG establishes a treatment framework available to injured persons who sustain a minor injury as a result of an accident. A "minor injury" is defined in the *Schedule* and includes sprains, strains, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. The MIG provides that a strain is an injury to one or more muscles and includes a partial tear. Under section 18 of the *Schedule*, injuries that are defined as minor are subject to a $3,500.00 funding limit on treatment.

[11] Pursuant to section 18(2) of the *Schedule*, the $3,500.00 funding limit for minor injuries does not apply if the Applicant can demonstrate that he had a documented pre-existing medical condition which would prevent him from reaching maximal recovery if subject to the MIG and the $3,500.00 funding limit.

I find no evidence demonstrating that the Applicant's pre-existing health conditions precluded his recovery from a minor injury

[12] The Applicant submits that he suffers from pre-existing chronic knee and back pain as documented by Dr. Skeete. He notes that he was previously prescribed orthotics for his back and knee issues. He further submits that the multiple complaints of knee and back pain prior to the accident were not considered by the insurer's examination ("IE") assessors. The Respondent submits that the Applicant has provided no opinion from any health practitioner that indicates his pre-existing back and knee pain impairs his ability to reach maximal recovery within the MIG. I agree with the Respondent.

[13] The Applicant has directed me to no evidence which indicates that his pre-existing back and neck pain precludes his recovery from his accident-related injuries. While I agree that Dr. Skeete's clinical notes and records ("CNRs") document pre-existing knee and back pains, including a referral for orthotics in 2015, this satisfies only half of the test. The remaining half of the test is that there must be compelling evidence that the pre-existing condition would preclude recovery if subject to the MIG. Dr. Skeete's CNRs fail to indicate that the Applicant's pre-existing back and knee pain would preclude his recovery

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following the accident. I see no reason why the IE assessors would conclude differently from Dr. Skeete on the issue, given the lack of comment or advice regarding the Applicant's pre-existing back and knee pain during the acute phase of his recovery following the accident.

[14] The Applicant reported pre-existing knee pain to Dr. Rabinovich, but it appears that the complaints warranted no direct comment on the issue. Dr. Rabinovich noted that it the pre-existing knee pain had no impact on the Applicant's ability to carryout his ADLs and or vocational tasks. I infer from this comment that the pre-existing knee pain had little impact on his functionality, it would have little impact on his ability to recover from sprain and strain injuries.

[15] Accordingly, I find that the Applicant has not demonstrated that he suffers from a pre-existing condition which precludes his recovery if subject to the MIG.

I find no compelling evidence that the Applicant sustained a neurological injury as a result of the accident

[16] The Applicant submits that the MIG is not compatible with objective, demonstrable, definable, and clinically relevant neurological signs. He refers to an MRI report dated August 28, 2019 whereby he was diagnosed with mild left neural foraminal stenosis secondary to a small broad-based disc bulge and ligamentum flavum hypertrophy. I infer from this evidence that the Applicant's position is that he sustained a neurological injury which is not included in the minor injury definition.

[17] The Respondent submits that the Applicant's complaints of radiculopathy alone are insufficient to find that he sustained a non-minor injury. It submits that Dr. Skeete made no referral to a neurologist or neurological testing, suggesting that the Applicant's reported radiculopathy does not rise to the level to find that he sustained a non-minor injury. I agree with the Respondent.

[18] I find insufficient evidence to demonstrate that the mild disc bulge and ligamentum flavum hypertrophy are as a result of the accident. As noted by the Respondent, none of the Applicant's healthcare providers opine that the issues were caused by the subject accident. While an opinion on causation is not necessarily required, it would benefit the Applicant in this situation. Dr. Skeete's CNRs indicate that the Applicant reported a history of similar back and knee pain aggravated by prolonged walking. As a result, and over time prior to the accident, Dr. Skeete prescribed back and knee braces, foot orthotics, and physiotherapy. Further, the Applicant discussed the aforementioned MRI findings on September 6, 2019 and was only referred to physiotherapy. Dr. Skeete made no referral for

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any other investigation or treatment and the Applicant never returned to Dr. Skeete for more than a year after this visit. Similarly, Dr. Skeete never referred the Applicant to a neurologist following the MRI.

[19] In the alternative, if I were to find that the disc bulge and the mild neural foraminal stenosis is as a result of the subject accident, I am unable to conclude that it is an injury that is not included in the minor injury definition. The Applicant again provides no medical opinion that it is more than a soft tissue injury. The injury is in keeping with the MIG, as the primary recommendation to address the issue is to engage in physiotherapy.

[20] I find that the radiculopathy symptoms reported by the Applicant are minor and can be treated within the MIG. Dr. Rabinovich identified normal neuromotor and no neurological impairments in the report dated May 8, 2019. Similarly, Dr. Skeete recorded no remarkable neurological symptoms in the CNRs tendered. In fact, Dr. Skeete made no neurological referral following a review of the MRI findings identifying a mild neural foraminal stenosis. This suggests that the issue is minor and warrants no additional treatment outside of the MIG.

I find no compelling evidence that the Applicant sustained a psychological injury as a result of the accident

[21] The Applicant submits that he suffers from chronic pain syndrome and it includes an underling psychological disorder. The Applicant also directs me to a visit with Dr. Skeete on September 8, 2020, which mentions somatic symptoms. Lastly, the Applicant highlights his complaints to assessors which include: low mood, anxiety, sleep disturbances, weight loss, decreased memory and concentration, and suicidal ideation.

[22] The Respondent submits that the Applicant has provided no opinion from a qualified professional that his psychological condition is of a severity to find that he sustained a non-minor injury. It further submits that Dr. Finkel, psychologist, found that the Applicant’s psychological symptoms fell within the minor injury definition and that this opinion should be preferred because it is the only psychologist presenting an opinion on the Applicant’s psychological injuries.

[23] Dr. Finkel is the only qualified healthcare professional to provide a definitive opinion on the Applicant’s psychological health, thus I prefer and adopt the findings in the report dated May 8, 2019. Dr. Finkel is a qualified psychologist and concluded that the Applicant’s psychological symptoms were mild and could be addressed within the MIG. Dr. Finkel acknowledged the Applicant’s self-reported symptoms, which included a report of suicidal ideation following the

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accident, but nevertheless determined that the Applicant sustained no psychological injury for which treatment is warranted. Dr. Finkel's conclusion is consistent with Dr. Skeete's CNRs, which include virtually no reference to psychological injuries. Dr. Skeete's September 8, 2020 note referred to by the Applicant includes no reports of the Applicant complaining of psychological symptoms. The records from that visit indicate that Dr. Skeete reviewed a differential diagnosis, the effect stress can have on somatic symptoms, addressed coping skills, and advised the Applicant to continue with home yoga, stretching exercises, and use Tramacet as required. I find that this reference to somatic symptoms and stress is insufficient to find that the Applicant sustained a psychological injury as a result of the accident. Further, there is no evidence demonstrating that Dr. Skeete made any referrals, recommendations, or follow-up arrangements to address psychological injuries. This suggests the psychological complaints, if any, are minor.

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[24] The Applicant's inconsistent reporting to M. Singh, psychological associate, impugns the validity of the assessors' opinions and causes me to prefer the report of Dr. Finkel. For example, in the June 12, 2019 psychological report by M. Singh, the Applicant reported that he briefly lost consciousness in the subject accident. Yet, no ambulance records were provided to support the Applicant's claim, despite reports that paramedics attended at the scene of the accident. Similarly, the Applicant reported to psychological associate Singh that he experiences severe levels of driver and passenger anxiety associated with avoidance behaviour but told Dr. Finkel during a prior assessment that he was able to drive by the scene of the accident. In another example, the Applicant reported that he lost 43 pounds in the seven months since the subject accident, yet this remarkable weight loss is not mentioned anywhere in Dr. Skeete's CNRs.

[25] I prefer Dr. Finkel's report and opinion over the opinion and report of Dr. I. Wilderman, physician, dated January 7, 2020. Dr. Finkel is a trained and licenced psychologist who is in a better position than Dr. Wilderman to identify, diagnose, and/or rule out psychological injuries. Dr. Wilderman's diagnoses of depression, anxiety, and severe post-traumatic stress disorder stem from psychometric testing conducted during the chronic pain assessment. The report includes no information to indicate that Dr. Wilderman is qualified to administer psychometric testing and interpret the results. According, I find that the Applicant has not sustained a psychological injury as a result of the accident that cannot be addressed within the MIG.

I find no compelling evidence that the Applicant suffers from accident-related chronic pain

[26] The Applicant submits that the majority of the injuries diagnosed by Dr. Wilderman in the report dated January 7, 2020 are not compatible with the minor injury definition. The Respondent is critical of Dr. Wilderman's report and conclusions and submits that the Applicant does not meet the criteria for chronic pain syndrome as outlined in the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* ("*AMA Guides*"), nor does he exhibit an ongoing functional impairment as a result of accident-related pain. I agree with the Respondent.

[27] I find Dr. Wilderman's report unpersuasive and in light of the Applicant's inaccurate reporting during the assessment and the other medical evidence. Dr. Wilderman's report relies heavily on the Applicant's self-reported symptoms and functionality, and fails to appreciate the contradictory evidence in the other medical records. For example, the Applicant reported to Dr. Wilderman an unremarkable pre-accident health history, that he lost consciousness for a moment following the accident, and is unable to complete household chores. Yet, he submits for this hearing that his pre-existing back and knee issues precluded him from recovering from his soft-tissue injuries within the MIG, he presented no evidence of a loss of consciousness, and reported independence with household chores to Dr. Rabinovich. Likewise, at five months post-accident the Applicant reported to Dr. Finkel that he is able to drive past the scene of the accident but reported to Dr. Wilderman that he did not drive for seven months following the accident. Dr. Wilderman reported that various medical records were reviewed as part of the assessment, including Dr. Skeete's CNRs, but failed to reconcile the discrepancies in the Applicant's self-reports to assessors and the other medical records.

[28] The Applicant does not exhibit the hallmarks of a chronic pain condition. He does not meet three of the six criteria in the *AMA Guides*: he provided no evidence of dependency or misuse of prescription medication or other substances; he is not excessively dependent on healthcare providers; he restored his pre-accident function, has returned to work and exhibits no deconditioning due to disuse; there is no evidence he has withdrawn from socializing due to pain, and any psychosocial sequalae appears to be minor, as opined by Dr. Finkel. The fact that the Applicant returned to work about two weeks following the accident and was able to secure a new, fulltime position, suggests that he does not suffer from a continuous functional impairment due to pain.

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[29] I find that Dr. Skeete's CNRs fail to demonstrate that the Applicant suffers from accident-related chronic pain. The CNRs note that the Applicant made sporadic complaints of ongoing back pain in 2019, but those complaints are not indicative of an ongoing functional impairment. In fact, the Applicant never made any accident-related complaints to Dr. Skeete for a year following a visit on September 6, 2019. On September 8, 2020, after a hiatus between visits, the applicant complained of recent body pains. Dr. Skeete advised the Applicant to continue home yoga exercises and use pain medication.

[30] Dr. Skeete's CNRs are unclear as to whether the Applicant's ongoing complaints are as a result of the accident. While Dr. Skeete mentions a referral to a pain clinic in an October 7, 2020 entry, the note also indicates that the Applicant did not initially agree with the referral and will think about the option. There is no evidence that the Applicant proceeded with the referral. Further, Dr. Skeete's CNRs for the years 2019 and 2020 refer to the accident two times in total, in relation to his intermittent back pain. When compared to the Applicant's pre-accident complaints, it appears that the Applicant's current presentation is a natural progression of his pre-existing intermittent back pain.

[31] The Applicant had intermittent back and knee pain prior to the accident, which has persisted. However, I find that the evidence does not demonstrate that he developed chronic pain as a result of the accident and his injuries are rightfully considered a minor injury as defined in section 3 of the *Schedule*.

The Applicant is not entitled to IRBs for the period claimed

[32] I find that the Applicant has not established that he is unable to work as a result of accident-related injuries.

[33] Pursuant to section 5 of the *Schedule,* IRBs are payable to insured persons who, within the first 104 weeks following the accident, are substantially unable to perform the essential tasks of their pre-accident employment as a result of an impairment. The test for entitlement becomes more difficult after 104 weeks following the accident and asks whether the insured person suffers a complete inability to engage in employment or self-employment for which they are reasonably suited by education, training, or experience.

[34] The Applicant claims entitlement to IRBs for the period from July 1, 2020 to November 2, 2020. He submits that Dr. Skeete's CNRs noted a mildly antalgic gait and an inability to sit for longer than 30 minutes, and that these impairments affect his ability to work and do household chores. He submits that his inability to sit led to his layoff on July 2, 2020 and claims entitlement to IRBs thereafter.

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[35] The Respondent submits that the Applicant failed to demonstrate that his accident-related impairments cause him to be unable to complete the essential tasks of his pre-accident employment. Further, that there are no independent or contemporaneous medical records to substantiate how or why his accident-related injures interfered with his continued ability to work.

[36] I find no compelling evidence to support the information provided by Dr. S. Thambirajah, chiropractor, in the disability certificate dated October 14, 2020. The disability certificate notes that the Applicant was unable to keep his employment as a server due to the physical nature of the job and his administrative position due to concentration issues related to back pain from prolonged sitting. It also noted that the anticipated duration of disability is more than 12 weeks, and that the Applicant was unable to return to work on modified hours or duties. The Applicant never provided Dr. Thamibirajah's CNRs for the hearing to enable me to understand how the conclusions in the disability certificate were made. Dr. Skeete's CNRs fail to support Dr. Thamibirajah's findings, nor do they mention any functional impairment during the period from July to November 2020. The most contemporaneous report of accident-related injuries affecting the Applicant's work is on March 1, 2019. This evidence simply does not support the Applicant's claim.

[37] There is no evidence to suggest that the Applicant's employment ended due to accident-related injuries or impairments. Following the accident, the Applicant missed about two weeks of work as a server at a restaurant. He returned to work, and later found a second job in an administrative setting. He quit his employment as a server effective December 2018 and continued working full-time at his administrative job, until it was terminated effective July 4, 2020. Contrary to the Applicant's submissions, the employment from the Applicant's administrative job fails to mention that the Applicant requires any accommodation or had any health conditions which would affect his performance.

[38] The Applicant has provided no medical evidence that measures his functionality following the accident. Nor does any of the evidence suggests that he experiences physical disfunction due to accident-related injuries. I am unable to find that he is entitled to IRBs in light of this and the conclusions outlined in the IE reports discussed previously.

[39] The Applicant's submission of the October 14, 2020 disability certificate does not engage the response provisions in section 36 of the *Schedule*. The Applicant suggests in his submissions that submitting a new disability certificate is akin to initiating an application for IRBs. I disagree. A disability certificate is required to

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initiate a claim for a specified benefit pursuant to section 36(2) of the *Schedule* and may be required again at the request of an insurer to determine ongoing entitlement pursuant to section 37(1). In the Applicant's case, the Respondent never requested a new disability certificate thus, the Applicant was not required to provide one. Instead, it was incumbent on the Applicant to advise the Respondent of his change in circumstances as soon as reasonably possible. Yet, he advised the Respondent of his change in circumstances in October 2020, despite the fact that he claimed IRBs for a period that started three months prior, on July 2, 2020.

[40] Accordingly, I find that the Applicant is not entitled to IRBs

The Applicant is not entitled to the treatment and assessment plans in dispute

[36] The plans in dispute proposed goods and services that fall outside the MIG. Having found that the Applicant is subject to the MIG, it follows that he is not entitled to the plans in dispute.

The applicant is not entitled to interest

[37] Interest applies on the payment of any overdue benefits pursuant to section 51 of the *Schedule.* As no benefits are overdue, no interest is payable.

The applicant is not entitled to an award

[38] The Applicant sought an award under section 10 of Reg. 664. Under section 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. Here, the Applicant submits that he is entitled to an award because he provided sufficient documents to confirm his loss of income during the period claimed, as well as medical documents. He characterizes the Respondent's refusal to pay as unreasonable. The Respondent submits that it acted reasonably based on the available information.

[39] I agree with the Respondent and find no award payable. As discussed earlier, the Applicant has not demonstrated that he suffers a substantial inability to complete his essential pre-accident tasks of employment to qualify for IRBs. It stands that the Respondent's refusal to pay the benefit was reasonable.

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CONCLUSION AND ORDER

[40] I find that the Applicant sustained a minor injury as a result of the accident. He has not met his onus to demonstrate that he is entitled to IRBs, the plans in dispute, interest, or an award.

[41] The Application is dismissed.

Released: July 20, 2023

Brian Norris
Adjudicator

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