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

Citation: Z.B. vs. Pafco Insurance Company, 2019 ONLAT 18-002215/AABS

Date: July 26, 2019
File Number: 18-002215/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:

Z.B.

Appellant(s)

and

Pafco Insurance Company

Respondent

DECISION

PANEL: **Jeffrey Shapiro, Vice Chair**

APPEARANCES:

For the Applicant: Z.B., Self-Represented

For the Respondent: Ryan Kirshenblatt, Counsel[1]

HEARD: **In-Person on May 22 and 23, and July 24, 2019**

[1] Sandra Buhain, counsel for the respondent, appeared on July 24, 2019, limited to requesting an adjournment.

OVERVIEW

[1] The applicant was a pedestrian injured in a motor vehicle accident on April 11, 2016 when a vehicle backed into him. The applicant applied for and received insurance benefits from Pafco Insurance Canada under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the "*Schedule*").

[2] The applicant briefly returned to his employment but did not continue for reasons in dispute. He received an income replacement benefit ("IRB") until June 7, 2017 when Pafco ended the IRB. Pafco also denied his request for further medical benefits. The applicant appealed those denials to this Tribunal, seeking a ruling that he is entitled to the IRB, and physiotherapy, massage therapy, and dental services.

[3] An in-person hearing on those disputes was held before me. The applicant testified on his own behalf, called a police officer, and submitted various medical and other records. Pafco relied on various records and called a physiatrist that performed an independent examination ("IE") of the applicant. The central focus of the hearing was on the applicant's functional abilities.

[4] The applicant subsequently withdrew the dental issue. After considering the evidence on the remaining issues, I find that Pafco is not required to fund the IRB, physiotherapy or massage therapy, for the reasons that follow.

ISSUES

[5] The precise issues I must decide are:

1. Is the applicant entitled to payment of an income replacement benefit of $399.76 per week from June 7, 2017 to date and ongoing?

2. Is the applicant entitled to a medical benefit of $1,560.72 for physiotherapy services, submitted March 9, 2017 and denied on June 16, 2017?

3. Is the applicant entitled to a medical benefit of $270 for massage therapy, submitted May 18, 2017 and denied on June 19, 2017?

4. If so, is the applicant entitled to interest for the overdue payment of benefits?

RESULT

[6] The applicant *is not* entitled to the IRB from June 7, 2019 to date and ongoing, the physiotherapy, or the massage therapy. As the applicant has withdrawn his claim for the dental services, as discussed below, I lack jurisdiction to make an award for it.

POSITION OF THE PARTIES

[7] The applicant submits he suffered ongoing impairments to his right shoulder, upper side of his ribs, neck, and spine/back, and experiences a burning sensation, among other injuries, from this accident. He contends the impact occurred at the same "impact point" of his earlier October 20, 2011 accident – in which he broke three ribs – causing a cumulative effect. He hears noises in his head, has anxiety and depression. Although he initially managed to return on modified duties to his pre-accident position as a driver/caterer, he was let go rather than offered an accommodation. He contends that therapy gives him much needed pain relief for a few days at a time. He also believes that tooth #37 and "another tooth" were damaged directly or indirectly because of the accident. He argues Pafco has been harassing him, the police lost certain records, and some physicians have not preformed the proper tests on him.

[8] Pafco submits that the medical evidence points to a minor injury with no objective signs of an ongoing impairment, and thus he can return to work and the requested therapy is not reasonable and necessary. Likewise, the evidence does not link the dental treatment to the accident.

ANALYSIS

[9] As a starting point, I note that the "onus" or legal obligation is on the applicant to prove his entitlement to the benefits he seeks on a balance of probabilities, rather than Pafco having an obligation to disprove his entitlement.

[10] Additionally, as several times during the hearing the applicant mentioned what he believes Pafco owes him – including amounts that are not permitted under the *Schedule* - I reiterate that I can only award benefits allowed under the terms of the *Schedule*. I do not have authority to award general damages, such as for pain and suffering.

Issue 1 - Is the applicant entitled to an IRB after June 7, 2017?

[11] Sections 5 and 6 of the *Schedule* provide that after the first week of an accident related disability, an IRB is payable for the *first* 104 weeks if, as a result of the accident, the insured person suffers "a substantial inability to perform the essential tasks" of the person's employment at the time of the accident. For periods *after* 104 weeks, the person must suffer "a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience."

[12] The amount (sometimes referred to as the "quantum") of the IRB is based on a percentage of the applicant's pre-employment income, capped at a maximum of $400 per week, unless the applicant purchased optional benefits. Although the applicant did initially comment that the IRB should be at a higher rate and that he is entitled to millions of dollars, I accept the correct rate potentially available in this matter is $399.76 per week for several reasons. The case conference order

did not list the IRB amount as an issue, the applicant did not provide evidence of a different amount, the $399.76 rate admitted by Pafco is virtually the maximum rate, and in any event, because I find below that the applicant did not establish his inability to perform his pre-accident employment after June 2017, the amount is a moot point.

[13] In support of his position that he is substantially unable to perform his pre-accident employment, the applicant called Officer M. Haji of the Toronto Police Service, who investigated the accident scene. Officer Haji explained that he was able to secure and view a video of the accident caught by a security camera. He testified from memory that the video showed a white Mercedes vehicle back into and strike the applicant. Officer Haji's testimony proves to me that the applicant was a pedestrian struck by a vehicle on April 11, 2016. I must now determine how the accident has affected the applicant – and Officer Haji's testimony is less helpful on this point.

[14] In brief, Officer Haji explained that his USB flash drive containing the video is not functioning and the original video from the business is no longer available. He does not recall other details of the video such as the severity of the impact.

[15] Nevertheless, while the video *might* have provided *some* clarity as to the severity of the impact, I do not find the video's unavailability to be particularly important in this matter, because the more important factor is how that impact – regardless of whether it was light or severe – has impacted the applicant, and what medical examinations and tests reveal about the ongoing effect of the impact.

[16] On that point, the applicant testified that at the time of the 2016 accident he had chronic back pain related to the earlier 2011 accident, but it was almost better, and he was able to work. His position as a driver/caterer was an active position that required him to lift boxes up several flights and remove food from a commercial vehicle. The 2016 accident aggregated his injuries – causing or aggravating his arthritis and causing him a generally degenerative physical condition.

[17] While he did manage to return to work for a few days, he stated that he could not go back any longer and started physical therapy. On cross-examination, he acknowledged emails that appear to show he was offered an accommodation, but he testified that shortly after he returned, the company was reorganized, and he was too new an employee to receive accommodations and felt he was laid off when the new employer learned of his accident. He also acknowledged that his Employment Insurance ("EI") file showed that he received sickness benefits, followed by unemployment benefits. Again, he explained that even though he received the unemployment benefits, he could not return to work.

[18] He felt that the physiotherapy and massage therapy provided him temporary relief from pain and allowed him to keep working. He essentially described it as

cruel that Pafco would stop funding the treatment, preventing him from working, causing him more stress and anxiety, and compounding his problems.

[19] The applicant produced several medical records – a few of which were essentially brief doctor's notes. I do not find them particularly helpful, as most did not mention the prior accident or opine that he cannot work. For instance:

a. On March 20, 2027, Dr. Abbasiranjbar prescribed medical cannabis. She mentioned the 2016 accident, but not the prior more severe one. Her focus appears to be on pain, not causation, with no identified review of prior records. (Ex. 5)

b. On April 4, 2017, Dr. Lansang, an orthopedic surgeon, records pain that "started when he was hit by a car when he was trying to check something in his tire", with no mention of the prior more severe accident. He opined that it is not "true mechanical pain" but "dysesthetic." He found a "stiff spine" in the applicant's neck, lower back and shoulders, X-rays showed chronic pain, and the applicant started to develop chronic pain condition. He re-emphasized core strengthening program, and "perhaps" a consult at a local pain clinic. (Ex. 6)

c. On May 3, 2018, Dr. Ugwunze, a psychologist, on referral from the applicant's family doctor, identified the applicant's symptoms of anxiety, depression, poor memory, pain in the back, and noise in the head, as being "ever since" the April 2016 accident. Again, the prior accident is not mentioned. He recommended an OHIP accepting psychotherapist. (Ex. 7). Pafco submitted Dr. Ugwunze's October 6, 2018 record where the applicant attributed "his anxiety and depression to not having anyone...[and] his mood to the cold." (Ex. 19)

d. On April 3, 2019, Dr. Kaur, the applicant's family doctor, issued a two-sentence note that mentions long standing back, neck and shoulder pain, with no mention of causation – or even either accident – but only degenerative disc disease. He mentioned physiotherapy "can be helpful" but does not actually recommend it. (Ex. 8)

e. On September 28, 2016, Dr. Kakar, a psychiatrist, in a letter to Dr. Kaur, regarding this accident did mention that the applicant advised that he had "chronic back injury…from his previous accident." While I accepted this letter over objection, I place little weight in it, as it is missing pages including the doctor's conclusion. (Exhibit 27)

[20] Pafco relied on the testimony of Dr. Raymond Lebieliauskas, a physiatrist, who performed an IE of the applicant on May 2, 2017. He believed the applicant had pain, but his examination showed the applicant was physically able to work. I accept his findings and analysis as it was thorough, considered the impact of the

previous accident, and was reasoned in explaining his findings. I highlight a few particularly important points:

a. His clinical examination of the applicant showed basically normal findings, revealing complaints of pain and limited range of motion in the shoulder, but which the doctor was able to passively manipulate. Importantly, the doctor could not find any objective signs of ongoing physical impairments, such as limited range of motion, muscle spasms, weakness, wasting, bands, or tenderness upon touch. In fact, the examination showed the applicant's muscles were normal, which caused him to believe the applicant could return to work.

b. His review of other available records – and how other providers treated the applicant's condition – supported the doctor's conclusion that the applicant suffered a minor injury in the accident that would not keep him out of work. For instance, the emergency room doctor who tended to the applicant on the day of the accident stated a return to work in 3 days, rather than a typical open-end instruction to follow-up with the family doctor. The family doctor, in turn, only billed OHIP for an unusually limited examination. X-ray and MRI reports were basically normal, with the MRI report showing 'osteophytes' or 'whiskers' from his spine, which he felt were age appropriate findings that likely pre-existed the accident and which would not affect the applicant's situation.

c. The doctor explained that soft-tissue injuries typically resolve in 12 weeks. Thus, in the applicant's situation, as he had completed his therapy from the first accident prior to this accident, the doctor did not believe a cumulative effect occurred that could delay healing in the second accident.

d. The doctor explained that passive therapy is medically useful for a limited period of time during which it helps the muscles heal, but that it can typically feel good indefinitely. Applying that to the applicant's situation, he felt the applicant was long beyond the time in which the requested treatment would actually be needed to help his muscles heal, even if it might feel good to him. Thus, he believed that going to the gym and doing similar activities would be appropriate and beneficial to the applicant. I find his explanation fit with, and explained, the applicant's experience.

[21] Pafco also produced Employment Insurance records showing the applicant claimed that as of December 6, 2016, he could return to work. However, the record also states that he could not return to the same type of working conditions.

[22] Pafco also introduced an email from the applicant's former employer about an accommodation, around April 2016. I do not find this evidence to be particularly

helpful as the relevant period of time for the applicant's IRB claim is June 7, 2017, over a year later.

Analysis – IRB

[23] While I found the applicant to be very sincere in his beliefs and felt he was trying to be fair and honest with me and the Tribunal, I nevertheless found some of his statements to be mistaken although made in good faith. For instance:

a. The applicant argued that I should not accept Dr. Lebieliauskas' testimony because it does not make sense given all the circumstances that the doctor could claim that he (the applicant) does not have pain. However, in my view, that is not what the doctor said. Rather, the doctor never disputed the applicant's pain – and was actually very clear he accepted it – but testified that his medical examination and review of other records could not find any objective evidence that would tie the pain to the accident, or more importantly, that the pain would prevent the applicant from working.

b. The applicant did not accept that a physiatrist, Dr. Lebieliauskas, should rely on a radiologist's report, particularly as this MRI was from a foreign country. The doctor explained that, in fact, it is common practice for a physiatrist to rely on a radiologist rather than viewing the MRI images himself, and also displayed some understanding of particular technologies used in that region.

c. The applicant attributed disreputable motives to Officer Haji for the video being unavailable, yet it appears to me that Officer Haji's explanation that the electronic video file was randomly damaged is plausible. I see no reason that Officer Haji would have any interest in damaging the USB or sabotaging the applicant's claim for IRBs as the applicant contends.

d. The applicant similarly attributed ill motives to medical practitioners for not performing various tests, such as not ordering an X-ray of his shoulder.[2] It appears that the various medical providers simply acted and ordered X-ray, MRI's and other tests – or declined to order – based on the medical evidence before them.

e. The applicant testified that he did not initially remember being laid off only after the new employer took over; but when shown records, he did remember.

f. The treatment plan for the physiotherapy does not mention the prior accident or impairments.

g. The paramedic report showed no signs of trauma.

[2] See, for example, Exhibit 6 – Records from Brampton Civic Hospital a year after the accident.

[24] As I mentioned above, I found the applicant to be sincere, but given the totality of testimony, I place greater weight on the objective testimony of Dr. Lebieliauskas, and his reliance on physical findings and the totality of the medical records. The applicant has not established on the balance of probabilities that he suffers "a substantial inability to perform the essential tasks" of his pre-accident employment, or that his difficulties are caused by the April 11, 2016 accident in any material way, and thus he is not entitled to an IRB.

Issues 2 & 3 – Medical Benefits – Physiotherapy and Massage Therapy

[25] Sections 14 and 15 of the *Schedule* provide that an insurer is liable to pay for medical expenses that are reasonable and necessary as a result of the accident.

[26] Regarding the physiotherapy and message treatment (Issues 2 & 3), based on the analysis above, and on Dr. Lebieliauskas' testimony, in particular, I do not find those benefits to be reasonable and necessary as a result of the accident.

[27] While prior decisions of the Tribunal establish that pain relief alone can, in certain circumstances, qualify treatment as reasonable and necessary, that does not appear to be the correct analysis here. Rather, as Dr. Lebieliauskas explained, the pain relief the applicant describes is largely independent of the actual physiotherapy or massage therapy, but rather is an endorphin effect. In other words, the requested treatment is not necessary from a medical perspective, and other self-directed therapy would be more appropriate.

[28] Regarding the message therapy, an additional reason applies. It was not properly requested under the procedures required in the *Schedule*. In brief, section 38 of the *Schedule* provides that *before* an applicant incurs treatment, his medical provider should submit the proposed treatment to the insurer on a form known as an "OCF-18/Treatment and Assessment Plan" for review and approval.

[29] In essence, 38(2) further provides that, unless certain circumstances apply, if the treatment is incurred before submitting the proposal to the insurer, the applicant cannot later dispute the insurer's refusal to pay for it.[3] In the applicant's situation, the evidence presented was that the massage therapy was incurred without a treatment and assessment plan being submitted beforehand. The applicant did not provide evidence to the contrary.

[30] As a result, given that none of the exceptions in s. 38(2) apply in the circumstance, Pafco is not liable to pay for the applicant's massage therapy because the expense was incurred before the applicant submitted a treatment plan.

Issue 4 – Medical Benefit – Dental

[3] Section 38(2) provides in part, "…an insurer is not liable to pay an expense in respect of a medical…benefit…that was incurred before the insured person submits a treatment…plan…"

[31] The hearing testimony on May 22 and 23, 2019 concerned the IRB and physiotherapy and massage therapy treatment plans, with little focus on the dental plan (Issue 4) then in dispute - approximately $4,078 for dental treatment.[4]

[32] Upon my review of the evidence, it appeared to me that the applicant might be entitled to the plan, but on a basis that neither party had yet addressed. Accordingly, I issued an order dated July 9, 2019 scheduling an in-person session for July 24, 2019 to hear the parties' submissions on the applicant's entitlement to the dental plan.

[33] On July 24, 2019, the respondent appeared by counsel, but requested an adjournment as Mr. Kirshenblatt, trial counsel, was unavailable with the short notice. In response, the applicant advised that he did not want a further delay and he was withdrawing the dental issue. I attempted to clarify that the further submissions were requested because he may be entitled to the treatment. Nevertheless, the applicant insisted on withdrawing the issue.

[34] Based on his request, made during a duly noticed hearing session, the issue is withdrawn.

CONCLUSION

[35] Pafco is not required to fund the requested Income Replacement Benefit from June 7, 2017 to date or ongoing, or the requested treatment plans for the physiotherapy, or the massage therapy. As the applicant has withdrawn his claim for the dental services, as discussed above, I lack jurisdiction to make an award for it. As no benefit has been found overdue, no interest is payable. The appeal is dismissed.

Released: July 26, 2019

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Jeffrey Shapiro
Vice Chair

[4] Is the Applicant entitled to a medical benefit of $4,078 for dental services, submitted on or about July 14, 2017, denied on July 14, 2017?