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: 17-002948/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

VINCENZO ANGHELONI

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR: **Chris Sewrattan**

APPEARANCES:

Representative for the applicant: Jessie V. Tran

Counsel for the Respondent: Paul Barnes

HEARD: Written Hearing: November 30, 2017

Overview

[1] The applicant was injured in a motor vehicle accident on February 21, 2015. He applied for a number of benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). Wawanesa Mutual Insurance Canada ("Wawanesa") denied payment for a number of benefits, primarily because it believes that the applicant's injuries are treatable under the *Minor Injury Guideline*. The applicant appeals to the Licence Appeal Tribunal – Automobile Accident Benefits Service for the payment of the disputed benefits.

Issues in Dispute

[2] The following issues are in dispute:

1. Is the applicant subject to the *Minor Injury Guideline*?
2. Is the applicant entitled to payment of the following active and passive medical treatments provided by York Medical Centre:
    a) $1,770.00 submitted in a treatment plan dated July 20, 2015, denied by the respondent on July 28, 2015;
    b) $2,600.00 submitted in a treatment plan dated November 9, 2015, denied by the respondent on November 20, 2015; and
    c) $2,600.00 submitted in a treatment plan dated September 26, 2016, denied by the respondent on October 7, 2016?
3. Is the applicant entitled to payment for the following examinations conducted by York Medical Centre:
    a) $2,200.00 for a social work assessment submitted in a treatment plan dated January 18, 2016, denied by the respondent on January 29, 2016; and

b) $2,200.00 for an orthopaedic assessment submitted in a treatment plan dated January 6, 2016, denied by the respondent on February 8, 2016?

4. Is the applicant entitled to payment for the following disability certificates (OCF-3) provided by York Medical Centre:
    a) $65.00 ($265.00 less $200.00 approved) for a disability certificate dated February 25, 2015, partially approved on March 11, 2015;
    b) $200.00 for a disability certificate dated February 3, 2016, denied by the respondent on March 1, 2016; and
    c) $200.00 for a disability certificate dated May 30, 2016, denied by the respondent on June 23, 2016?
5. Is the applicant entitled to Income Replacement Benefits:
    a) Is the applicant entitled to a weekly income replacement benefit from February 28, 2015 to May 3, 2015, denied by the respondent on September 10, 2015?
    b) If the applicant is entitled to income replacement benefits, what is the weekly amount to which he is entitled?
6. Is the applicant entitled to interest for the overdue payment of benefits?

Result

[3] All of the applicant's claims are denied. And since no payment is owing, the applicant is not entitled to interest.

[4] The applicant is not entitled to payment for the active and passive medical treatments, examinations, or disability certificates provided by York Medical Centre. Payment hinges on the applicant receiving treatment outside of the *Minor Injury Guideline*'s $3,500 payment limit. The applicant has failed to prove that he suffers from an injury as a result of the accident that is not predominantly minor; as a result, the applicant's treatment is subject to the *Minor Injury Guideline*'s payment limit.

[5] Although the applicant may be entitled to an Income Replacement Benefit, he has failed to prove what the weekly rate of the benefit should be. As a result, he is entitled to $0 per week.

Discussion

The Application of the *Minor Injury Guideline*

[6] Although the Order for this hearing frames the issues in terms of entitlement to treatment plans, it is clear from the parties' submissions that the real issue is the application of the *Minor Injury Guideline.* The parties' submissions almost exclusively focus on the *Minor Injury Guideline*'s application; the submissions only tangentially touch upon the reasonableness and necessity of some of the treatment plans. I am unclear as to whether the applicant has used up his $3,500 entitlement to benefits under the *Minor Injury Guideline*'s payment limit. I assume that he has because of the parties' almost exclusive submissions on the *Minor*

Injury Guideline's application. If the applicant has not used up his $3,500 entitlement, I leave it to the parties to determine how the applicant is paid this amount.

[7] The term "minor injury" is a legal concept under the *Schedule*. It refers to "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": see s. 3 of the *Schedule*. To be clear, the term "minor injury" does not mean that an insured person's injury is harmless or trivial. Indeed, I accept that in this case the applicant suffers from pain as a result of his accident.

[8] One way to remove treatment from the confines of the *Minor Injury Guideline* is to prove that the injury is not predominantly minor: see s. 18(1). The applicant submits that the physical injury he sustained as a result of the accident is not predominantly minor and, as a result, he is not subject to the $3,500 payment limit imposed under the *Minor Injury Guideline*.

[9] For analytical purposes, I will divide the applicant's submission between physical injury and psychological impairment.

1. Physical Injury

[10] The applicant submits that he suffers from chronic pain which, according to him, is not a predominantly minor injury. To prove this submission, the applicant relies on four evidentiary items:

1. The circumstances of the accident;
2. Dr. Bui's report;
3. Dr. Mallis' report; and

4. Dr. Castiglione's notes and records.

[11] The circumstances of the accident are that the applicant was struck in the right side of his vehicle, hitting his head on the window. The applicant did not lose consciousness. He was able to drive away from the scene and attend a collision reporting centre sometime later. Emergency personnel did not attend the scene. Approximately six years prior to the accident, in 2009, the applicant suffered a workplace injury in which he injured his cervical spine.[1]

[12] Dr. Bui authored an orthopedic assessment report on June 27, 2016. In the report, Dr. Bui concluded that the applicant could not be treated under the *Minor Injury Guideline.* Dr. Bui described the applicant's complaints of headaches and neck and shoulder pain, and surmised that the applicant suffers from cervical segmental somatic dysfunction and cervical strain with evidence of residual impairments and restricted range of motion in the cervical spine. The applicant submits, essentially, that Dr. Bui's diagnosis is evidence that the applicant suffers from chronic pain. It bears mentioning that Dr. Bui did not diagnose the applicant with chronic pain or chronic pain syndrome.

[13] The applicant is required to prove that the injury causing his pain is not a clinically associated sequelae: see the definition of minor injury in s. 3 of the *Schedule*. This means that the applicant must show that the pain from which he suffers is not a consequence of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation. Regardless of what term is used to characterize the applicant's injury, chronic pain or otherwise, I am not

[1] The applicant did not provide submissions relating to a pre-existing injury and its applicability to the *Minor Injury Guideline*.

convinced on a balance of probabilities that the injuries diagnosed by Dr. Bui are more than sequelae to the strain caused to the applicant as a result of the accident.

[14] In addition, I am not comfortable placing significant weight on Dr. Bui's diagnosis because of the medical examinations commissioned by Wawanesa. Wawanesa's medical examinations produced reports that came to different conclusions than Dr. Bui. I will discuss Wawanesa's experts' reports and their strengths later in this decision. For now what is important is that the examination reports prevent me from placing significant weight on Dr. Bui's diagnosis.

[15] Dr. Mallis works at the Pain and Wellness Centre. One Dr. Mallis' chiropractors assessed the applicant on December 10, 2015. The applicant was diagnosed with having left sided chronic myofascial pain in various neck muscles.

[16] I do not accept Dr. Mallis' diagnosis. Dr. Mallis' analysis amounts to a 1.25-page letter with little description of how she tested the applicant, how the applicant scored on those tests, and what conclusions Dr. Mallis drew from those scores. A chronic condition is a serious diagnosis. I would like to see this information if I am to place weight on a diagnosis of a chronic condition. This is particularly so when the insurer has a number of expert reports that do not diagnose a chronic condition. The bulk of Dr. Mallis' letter is a description of the applicant's self-reports of pain. While this is helpful information, it is not enough to support a diagnosis of a chronic condition in this case.

[17] Dr. Castiglione is the applicant's family physician. Dr. Castiglione's notes and records document the applicant's suffering from pain between October 23, 2015

and July 13, 2017. The applicant submits that the two-year period in which he has suffered from pain since his accident is proof of chronic pain.

[18] I accept that a lengthy history of pain can be circumstantial evidence of chronic pain syndrome and/or chronic pain. However, a lengthy history of pain is not necessarily proof of chronic pain. In this case, I require more proof, for two reasons. First, for the reasons already provided I have serious issues with the applicant's two medical documents that he submits show proof of chronic pain, Doctors Bui and Mallis' respective reports. Second, some of Wawanesa's expert reports, while flawed, prevent me from concluding on a balance of probabilities that the applicant suffers from chronic pain syndrome or chronic pain.

[19] I will now discuss Wawanesa's expert reports. Before delving into the content of the reports, I wish to address the applicant's two main criticisms of Wawanesa's experts. The applicant alleges that the experts colluded with each other to deny payment for benefits in dispute. The applicant points to admissions in the expert's reports that they read the reports of other experts commissioned by Wawanesa. As well, the applicant points to a title in the reports, "Minor Injury Determination", as evidence of the experts' desire to confine the applicant to treatment within the *Minor Injury Guideline*.

[20] To this criticism, I offer a simple conclusion. There is not enough evidence to find that Wawanesa's experts colluded to deny the applicant payment for benefits. The experts are expected in circumstances, as here, to read other expert reports so that they are fully informed when they provide an expert medical opinion. The titles in the reports are analytical signposts, nothing more. Without actual

evidence of collusion, I am unable to find that the experts acted with a nefarious purpose.

[21] Second, the applicant submits that the opinions of Wawanesa's experts carry no weight because they specifically did not address whether the applicant suffers from chronic pain and whether that diagnosis, if true, removes the applicant from the *Minor Injury Guideline*. The submission is belied by the substance of the expert's opinions. Wawanesa's experts considered the test for "minor injury" and found that the applicant falls within its scope. After reading the expert's reports, I am confident that if they believed the applicant suffered from a chronic condition they would have articulated it, and if they believed the chronic condition was not a predominantly minor injury they would have articulated that too. The silence of Wawanesa's experts on these issues indicate that they did not believe that the applicant suffers from a chronic condition that is not predominantly minor.

[22] Wawanesa commissioned reports and addenda from five experts in relation to the applicant's disputed treatment plans. Dr. Zarnett, an orthopedic surgeon, authored one report and two addenda. Dr. Zarnett concluded that as a result of the accident the applicant suffers from an uncomplicated myofascial strain to his cervical spine. Dr. Zarnett recommended that the *Minor Injury Guideline* apply and that the applicant not receive further facility based treatment. Dr. Zarnett's second addendum, dated September 8, 2016, accounts for Dr. Bui's othopaedic report and maintains the conclusion that the applicant suffers from an uncomplicated myofascial strain to his cervical spine.

[23] I cannot say whether I prefer Dr. Zarnett's report to Dr. Bui's. What I can say is that Dr. Zarnett's diagnosis is enough to prevent me from concluding that the

applicant suffers from an injury that is not predominantly minor. Although Dr. Zarnett is an othopaedic surgeon, his report and addenda do not describe testing methods. I am left in the dark about what test data, if any, Dr. Zarnett used to draw his conclusions. I place the same amount of limited weight on Dr. Zarnett's conclusions as I do on Dr. Bui's conclusions. For his part, Dr. Bui documented his range of motion tests and the results of his tests. But I am not convinced on a balance of probabilities that Dr. Bui's diagnosis describes an injury that is not predominantly minor. In particular, I am not convinced that the pain documented by Dr. Bui in his report is more than a sequel to a sprain, strain, or subluxation.

[24] Dr. Silver, a family physician, authored a report and addendum. Dr. Silver considered an MRI report dated March 17, 2015. The MRI report did not show any orthopedic abnormalities. Dr. Silver diagnosed the applicant with myofascial neck pain with associated tension-type headaches. Dr. Silvers' examination did not reveal any functional impairments or evidence of significant ongoing accident related injuries.

[25] I take the same issue with Dr. Silver's analysis as I do with Dr. Zarnett's. There is scant information about the testing methods Dr. Silver used on the applicant, what those results were, and what conclusions he drew from those results. Nevertheless, as with Dr. Zarnett's report, the limited weight I am able to place on Dr. Silver's analysis is on the whole sufficient to prevent me from concluding that the applicant suffers from an injury that is not predominantly minor.

[26] Dr. Markson, a neurologist, authored a report. Dr. Markson considered the March 17, 2015 MRI and concluded that the applicant does not suffer from a

neurological impairment. I accept Dr. Markson's diagnosis. However, it is not directly related to the issue of chronic pain, the real area of debate.

[27] Dr. Yufe, another neurologist, authored one report and two addendems. Dr. Yufe found that the applicant has a normal neurological examination. His headaches were held to be primarily a tension type.

[28] Dr. Yufe did not describe his methodology. I have no basis to assess the soundness of Dr. Yufe's neurological conclusions. As a result, I do not place much weight on Dr. Yufe's conclusions. This does not aid the applicant much, though; Dr. Yufe's analysis addresses neurological injury. It is not directly related to the issue of whether the applicant suffers from chronic pain.

[29] To summarize, I have issues with the analysis of Doctors Zarnett, Silver, and Yufe because they do not describe their respective methodologies. For Doctors Zarnett and Silver, this results in reduced weight on their reports and addenda. The weight that is placed on their analysis is sufficient for me to conclude that the applicant has not proven that he suffers from an injury that is not predominantly minor. The analysis of Doctors Markson and Yufe do not materially touch upon the issue of chronic pain.

2. Psychological Impairment

[30] The applicant submits that his chronic pain has caused a psychological impairment. The applicant was assessed by Ms. Shayna Pilc, a social worker. Ms. Pilc authored a report in which she commented that the applicant is experiencing psychological symptoms and social issues, including isolation.

[31] I am unable to place much weight on Ms. Pilc's analysis. Her assessment report is essentially a summary of the applicant's self-reported psychological issues. While this is helpful information, it is not specialized knowledge that is outside of my ability to understand. Moreover, Ms. Pilc does not describe any testing methodology or provide a diagnosis. Rather, her conclusion is that the applicant requires specific treatment to address his self-reported psychological issues. Ms. Pilc's assessment and the question I have to answer are at cross purposes. Her assessment might be helpful to determine if psychological treatment is reasonable and necessary, but it does not aid me in deciding whether the applicant's treatment is confined to the *Minor Injury Guideline.*

[32] Wawanesa's fifth expert is Dr. Wolf, a psychologist. Dr. Wolf examined the applicant and concluded that the he does not suffer from a diagnosable psychological condition. From this conclusion Dr. Wolf commented that the applicant is treatable under the *Minor Injury Guideline*.

[33] For the same reason as Ms. Pilc's assessment report, I am unable to place much weight on Dr. Wolf's analysis. Dr. Wolf's conclusions are largely based on the applicant's self-reports. The only psychological test conducted was the Rey 15-Item Memory Test, which showed that the applicant was not malingering.

[34] The applicant bears the onus of proving on a balance of probabilities that he suffers from a psychological impairment that is not predominantly minor. He has not sufficiently proven his case.

[35] I have also considered whether the combination of the applicant's physical and psychological condition constitute in an injury that is not predominantly minor. I am unable conclude that the condition is a non-predominantly minor injury.

[36] The applicant's treatment is confined to the *Minor Injury Guideline* because he has failed to show that he sustained an impairment that is not predominantly a minor injury, or that a pre-existing medical condition prevents maximal recovery.

Other Issues Relating to the Disputed Treatment Plans

1. The Disability Certificates

[37] There are three disability certificates in dispute:

1. $65.00 ($265.00 less $200.00 approved) for a disability certificate dated February 25, 2015, partially approved on March 11, 2015;
2. $200.00 for a disability certificate dated February 3, 2016, denied by the respondent on March 1, 2016; and
3. $200.00 for a disability certificate dated May 30, 2016, denied by the respondent on June 23, 2016.

[38] The applicant is not entitled to payment for any of the disability certificates in dispute. Wawanesa submits that it has paid for the first two disability certificates. The third disability certificate was submitted by York Medical Centre on an unsolicited basis.

[39] Wawanesa's submissions are not evidence. However, they are serious allegations and I trust that counsel would only put forward such submissions on a good faith basis. The applicant bears the burden of proving his entitlement to payment for the disability certificates. As a result, I require the applicant to prove that the first two disability certificates were not already fully paid for, and that he solicited the third disability certificate from York Medical Centre. This is not a difficult task.

[40] The applicant's Reply to Wawanesa's submissions is that "… the disability certificates are between the treating doctor or and his patient." I am not satisfied with this response. I find that the applicant has failed to prove his entitlement to the three disability certificates in dispute.

Income Replacement Benefit

[41] If the applicant is entitled to an income replacement benefit (IRB), the weekly rate of the benefit is $0. The reason is because the applicant has failed to prove in any intelligible way the weekly rate to which he is entitled.

[42] The Tribunal's Order for this written hearing places IRB entitlement and weekly rate as distinct disputed issues. However, the parties' submissions skip over the issue of entitlement. The parties only litigated the amount of the weekly payment. For the purpose of this decision, I will assume that the applicant is entitled to an IRB and assess the weekly rate to which he is entitled. The distinction is theoretical because, as I will explain, the applicant is entitled to $0 per week. I note that the time period in dispute for the IRB is relatively short: February 28, 2015 to May 3, 2015.

[43] The applicant submits he is entitled to the maximum weekly rate of $400. The onus is on the applicant to prove his entitlement to this rate. The applicant was self-employed at the relevant time in his personal landscaping business. There are significant issues with the applicant's account of the time period in dispute.

[44] 2015 is the year of the accident and the year of the IRB time period in dispute. The applicant did not work during the time period in dispute but his business continued to operate. The applicant's personal income, which is derived from his personal business, increased 54% in 2015 relative to 2014 according to the CRA Notices of Assessment. Under s. 7(3) of the Schedule, Wawanesa is entitled to deduct from the IRB up to 70% of any income received during the time period in dispute.

[45] Wawanesa's accounting firm wrote to the applicant 22 times to obtain the banking records necessary to determine the IRB rate to which he is entitled. The applicant provided banking records in June 2017. But there are significant omissions in the banking records. The time period in dispute is February 28, 2015 to May 3, 2015. However, pages of the banking records are missing or withheld that would cover the following time periods in 2015: January 1 to February 1, March 1-31, April 1-30, and May 1-31.

[46] I make no finding on what amount is deductible from the applicant's IRB under s. 7(3), or what content would be found on the missing pages of his banking records. I do find, however, that the missing bank pages make it impossible to calculate the applicant's IRB quantum in this hearing. I appreciate the difficulty that a self-employed person such as the applicant might have in procuring

financial records from two years ago. The law requires that the Wawanesa have an intelligible basis upon which to calculate the IRB claim nevertheless.

[47] The applicant submits that I should grant him the full $400 weekly rate and allow Wawanesa to claim any excess back after its accounting firm is able to calculate the weekly rate. I disagree. The applicant bears the onus of proving his IRB rate. He has failed to do so. As a result, the applicant is entitled to $0 per week for the time period in dispute.

Interest

[48] Given my decision, no interest is owing.

Conclusion:

[49] The applicant is not entitled to payment for the active and passive medical treatments, examinations, or disability certificates provided by York Medical Centre.

[50] While the applicant may be entitled to an Income Replacement Benefit, based on the evidence provided in this hearing the weekly rate of payment is $0 per week.

[51] The applicant is not entitled to interest as there are no overdue payments.

Released: 12/03/2018

Chris Sewrattan,
Adjudicator