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 No.: 19-001699/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, in relation to statutory accident benefits.

Between:

Huseyin Ozturk

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: **Nidhi Punyarthi**

APPEARANCES: **Michelle Moraes, Licensed Paralegal for the Applicant**

Paul Irish, Lawyer for the Respondent

Heard: **Heard by way of written submissions**

OVERVIEW

[1] On April 28, 2016, the applicant was involved in a car accident. He applied to the respondent for benefits under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("*Schedule*").[1] The respondent denied his claim for benefits. He applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service ("Tribunal").

[2] The matter proceeded to a written hearing before me.

ISSUES

Preliminary Issue

[3] At the case conference, the parties had agreed on consent that the applicant will produce additional evidence by September 27, 2019.[2] The applicant did not produce that evidence to the respondent until much November 26, 2019.

[4] Consequently, as a preliminary issue, the respondent asks that certain evidence (consisting predominantly of medical records)[3] from the applicant be excluded because the applicant failed to comply with a production deadline in the Case Conference Order.[4]

Result

[5] For the reasons explained below, I have decided to allow this late evidence. This is, of course, a distinct point from the question of whether I will give weight to the evidence.

Analysis

[6] The applicant does not dispute that he was late in producing these records. He states that the reason for his lateness is that he was waiting for the records from third parties. As such, he states that the delay was beyond his control. He did not provide me with evidence of his efforts to comply with the deadline.

[7] The respondent states that it is prejudiced by the applicant's late delivery of the records. There was no evidence of such prejudice before me. From my reading of the respondent's written submissions, the respondent was able to fully deal

[1] O. Reg. 34/10.
[2] Case Conference Order of Adjudicator Kowal, at para. 3(i).
[3] Paragraph 11 of the Respondent's Submissions contains a full list of these records.
[4] Case Conference Order of Adjudicator Kowal, August 19, 2019.

with the evidence even though it was produced late. In the circumstances of this case (explained in greater detail when I address the substantive issues), I also cannot conclude that had the evidence been produced sooner, it would have caused the respondent to change its decision or adjust the claim differently.

[8] The respondent also suggests that the Tribunal should be a true appeal body and that it cannot consider evidence that was not before the adjuster at the time of the original determination.

[9] The Rules of Practice and the *Statutory Powers Procedure Act,* R.S.O. 1990, c.S. 22 do not support such a position. These rules and enabling legislation specifically permit the Tribunal to receive evidence on some conditions and make findings based on that evidence. There is no prescribed condition that the evidence before the Tribunal be limited to what was before the adjuster originally. The case relied on by the respondent, *Palmer v. The Queen* [1980] 1 S.C.R. 759, is a criminal appeal and does not assist me in interpreting how the Tribunal should deal with evidence that was submitted after its ordered deadline.

[10] How the Tribunal deals with breaches of its orders will depend on a case-by-case basis. The Tribunal must strive to achieve a fair and efficient resolution of the dispute on the merits.[5]

[11] Based on the evidence before me, I do not see that the late production of evidence caused a lack of fairness to the respondent. Here, the respondent was still able to respond to the evidence in its submissions.[6] Also, I could not find that an earlier production of the evidence would have led the respondent to change its position or adjust the matter differently. According to the evidence before me, the late production did not cause the respondent prejudice.

[12] In these circumstances, it would be efficient to proceed with the evidence that the applicant wishes me to consider and that the respondent has already responded to. Considering both the late evidence and the substantive responding submissions to that late evidence provides me with both parties' arguments in relation to that evidence for the purposes of the final decision. As such, there is no prejudice or absence of procedural fairness in this specific case.

[5] Rule 3.1 of the Rules of Practice and Procedure, effective October 2, 2017.
[6] The Motion Order of Adjudicator Makhamra, dated November 12, 2019 also extended all deadlines for submissions by 2 weeks.

[13] Therefore, I will allow the evidence in this instance and consider the arguments made by both parties in relation to that evidence. Separately, whether this evidence will be given weight for the purposes of my decision will depend on:

i. whether it was referred to in the applicant's submissions with pinpoint references, as required in the Case Conference Order;[7] and

ii. whether it is persuasive on a balance of probabilities.

Conclusion

[14] I allow the evidence that was produced by the applicant after the deadline in the Case Conference Order in this particular case. This is different from a consideration of whether that evidence is given weight. Later in this decision, I will discuss the weight given to the evidence.

Substantive Issues

[15] According to the parties' submissions, the issues that remain in dispute are as follows:

i. Are the applicant's injuries predominantly minor as defined in the *Schedule*?

ii. If the applicant's injuries are not predominantly minor, then:

a. Is the applicant entitled to $1,131.44 for an attendant care assessment by the Toronto Medical Centre submitted September 2, 2016 and denied September 12, 2016?

b. Is the applicant entitled to $1,904.51 for chiropractic treatment by the Toronto Medical Centre submitted September 2, 2016 and denied September 12, 2016?

c. Is the applicant entitled to $1,230.81 for chiropractic treatment by the Toronto Medical Centre submitted October 4, 2016 and denied October 14, 2016?

iii. Is the applicant entitled to interest on any overdue payments of benefits?

[7] Case Conference Order of Adjudicator Kowal, at para. 6(ii).

RESULT

[16] The applicant's injuries from the accident are predominantly minor. As a result, the applicant is not entitled to the benefits or interest claimed. The application is dismissed.

ANALYSIS

[17] If an insured person has a predominantly minor injury, that person cannot access more than $3,500 in benefits.[8] The *Schedule* defines a minor injury as "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."[9]

[18] Under s. 18(2) of the *Schedule,* an insured person's injury from the accident is not minor if:

i. There is compelling evidence that the insured person has a pre-existing medical condition;

ii. The pre-existing medical condition was documented by a health practitioner before the accident; and

iii. The pre-existing medical condition will prevent the insured person from achieving maximal recovery from the minor injury within the $3,500 limit.[10]

[19] In this case, the respondent determined that the applicant's injuries from the accident to be predominantly minor. As a result, the respondent did not approve benefits beyond the $3,500 limit. The benefits at issue in this hearing are beyond the $3,500 limit.

[20] The applicant argues that his injuries are not predominantly minor because he has a pre-existing medical condition that meets the requirements of s. 18(2) of the *Schedule*. He also argues that he has chronic pain as a result of the accident.

[21] As I will explain below, the applicant does not persuade me of either of these arguments on the evidence.

---

[8] *Schedule*, s. 18(1).
[9] *Schedule,* s.3.
[10] *Schedule*, s. 18(2).

Evidence regarding the applicant's injuries from the accident

[22] On April 28, 2016, the applicant was involved in a side-swipe collision. Air-bags did not deploy. He did not seek medical attention and proceeded to attend an appointment at his daughter's school. This is how the applicant described the event to his treatment provider at the Toronto Medical Centre and to the respondent's IE assessor.

[23] Photographs of the vehicle taken after the accident show very minor damage to the vehicle. Structurally, the vehicle appears to be intact in the photographs.

[24] One month after the accident, the applicant went to see his family doctor. At the meeting, he did not mention the accident. He only complained of a skin rash and was requesting a refill of his diabetic medication.[11]

[25] Three months after the accident, the applicant went to see his family doctor again. This time, he reported the accident and complained of neck pain. He said he had pins and needles in both hands. He denied weakness in his hands. The family doctor conducted an examination and recorded normal results.[12]

[26] According to the X-Ray that was taken after this meeting, the accident from April 2016 did not cause any compression deformity or bony injury. There were C5-C6 changes associated with spondylisis that was not related to the accident.[13]

[27] The applicant then started treatment at the Toronto Medical Centre. It appears from the records that he went for treatment until he reached the $3,500 limit. On his first visit on July 26, 2016, it was noted: "R elbow is worse post MVA. Forearm stretches and icing instructions. Numbness a little better."

[28] The remainder of any notes from the Toronto Medical Centre show that the applicant was progressing in his treatment. There are no notes of accident-related issues that persisted despite treatment. During the remainder of 2016, the applicant did not complain of the accident to his family doctor at all.

[29] Given the evidence before me of:

i. How the treatment records describe the applicant's injuries following the accident;

[11] Note of Dr. Hoca, May 30, 2016.
[12] Note of Dr. Hoca, July 20, 2016.
[13] X-ray, July 21, 2016.

ii. The applicant's story of the events of the day of the accident;

iii. The photographs of his vehicle after the accident;

iv. The fact that the applicant did not seek medical attention immediately after the accident;

v. The fact that his first visit to his family doctor regarding the accident was three months after the accident; and

vi. The fact that he did not mention the accident again to his family doctor during visits in 2016;

The applicant has not established, on a balance of probabilities, that his injuries from the accident are predominantly minor. Instead, this evidence supports the opinion of the IE assessor, Dr. Dessouki.

[30] In either January or February 2017, the applicant had another accident. He reported this to the respondent's IE assessor. However, both his initial and reply submissions are silent on this subsequent accident.

[31] Based on the records before me, the applicant's injuries from the accident at issue are predominantly minor. As will be discussed below, he is not exempt from this definition because of a pre-existing medical condition or chronic pain.

Pre-existing Medical Condition

[32] In order for the applicant to satisfy me that he has a pre-existing medical condition sufficient to remove him from the minor injury category, he must satisfy me of the three conditions in s. 18(2) of the *Schedule*:

i. Compelling evidence of a pre-existing medical condition;

ii. Documentation of the pre-existing medical condition by a health practitioner before the accident; and

iii. Evidence that the pre-existing medical condition will prevent the insured person from achieving maximal recovery from the minor injury within the $3,500 limit.

[33] According to the applicant's family doctor notes, he had hypertension, diabetes and dyslipidemia before the accident. The respondent does not dispute this fact. Therefore, I need not address the first two conditions.

[34] With regards to the final condition, the applicant submits that he is unable to achieve maximal medical recovery given the pre-existing medical conditions. He does not support this submission with any evidence.

[35] Specifically, the applicant does not show, with persuasive evidence, how these specific pre-existing medical conditions make it so that he is unable to achieve maximal medical recovery from his accident injuries within the $3,500 limit.

[36] Given the lack of evidence on the third condition, I find that the applicant does not satisfy the criteria of s. 18(2) of the *Schedule*. On the evidence, he does not have a pre-existing medical condition that would entitle him to benefits in excess of $3,500.

Chronic Pain

[37] The applicant argues that he has chronic pain due to the accident and that, as a result, he should be taken out of the minor injury category.

[38] As evidence of this submission, the applicant points me to a right shoulder ultrasound from October 7, 2019 which shows infraspinatus calcific tendinopathy. There is also a CT scan from August 2018 which shows mild diffuse brain atrophy.

[39] The applicant has not provided me with any other evidence in support of the argument or any additional analysis.

[40] There is no opinion before me connecting the conditions to the accident at issue. In addition, there is no medical opinion before me diagnosing the applicant with chronic pain as a result of the accident. There is also the question of whether the subsequent accident (and not the accident at issue) impacted the applicant.

[41] Based on the evidence before me, which is significantly lacking, I cannot find that the applicant has chronic pain as a result of the accident at issue.

[42] Accordingly, the applicant is not removed from the minor injury category on the basis of chronic pain.

[43] The applicant’s injuries from the accident are predominantly minor.

No Entitlement to Benefits or Interest

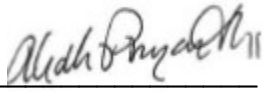
[44] Given my finding that the applicant's injuries from the accident are predominantly minor, and given that he has exhausted the $3,500 limit for minor injuries, there is no need for me to address whether he is entitled to the benefits at issue.

[45] As I have not found benefits to be overdue, no interest is payable.

CONCLUSION

[46] The application is dismissed.

Date: June 15, 2020



Nidhi Punyarthi
Adjudicator